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THE
PUNJAB RECORD,

OR
Reference Book for Civil Officers,

CONTAINING

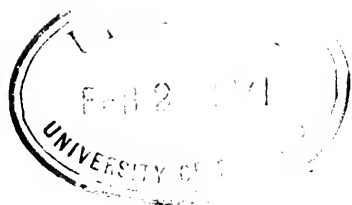
THE REPORTS OF CIVIL AND CRIMINAL CASES DETERMINED BY
THE CHIEF COURT OF THE PUNJAB AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM
THAT COURT, AND DECISIONS BY THE FINANCIAL
COMMISSIONER OF THE PUNJAB.

REPORTED BY
C. H. OERTEL, BARRISTER-AT-LAW.

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v.47

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1912.

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THE HON. SIR ARTHUR REID, KT.

JUDGES :

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” ” ” ” D. C. JOHNSTONE—(*on leave from 29th February 1912*).

” ” ” ” H. A. B. RATTIGAN.

” ” ” ” SHAH DIN—(*Officiating*).

” ” ” ” W. CHEVIS—(*Temporary Additional Judge*).

” ” ” ” H. SCOTT-SMITH—(*Officiating 2nd Temporary Additional Judge from 29th February to 4th July*).

” ” ” ” G. C. BEADON—(*Officiating 2nd Temporary Additional Judge from 5th July*).

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1912.

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ACTS—*conclld.*IX of 1899—See *Indian Arbitration Act.*I of 1900—See *Punjab Limitation Act.*XIII of 1900—See *Punjab Alienation of Land Act.*II of 1905—See *Punjab Pre-emption Act.*V of 1908—See *Civil Procedure Code, 1908.*IX of 1908—See *Indian Limitation Act, 1908.*I of 1912—See *Punjab Courts (Amendment) Act.*

ACT XIII of 1855.

Claim for compensation against persons who had been convicted in a Criminal Court as members of an unlawful assembly, one of whom caused the death—their Civil liability—proof required in Civil Court—evidence.

Held, that a claim for compensation under Act XIII of 1855 lies only against the person who actually caused the death or at least took part directly in causing it, and not against persons who may have been found criminally responsible as members of the unlawful assembly.

Held also, that plaintiff must prove that defendant caused the death. It is not sufficient to refer to the criminal case in which defendant was convicted, though the proceedings in that Court may be examined to test the evidence offered in the Civil Court.

56 P. R. 1905 (*Mahi v. Ambo*), differentiated.

... ..

No. 117 P. R. 1912.

ADOPTED SON.

(1) Succession of—to property of natural father.

See *Custom (Succession)* (9).

... ..

No. 45 P. R. 1912.

(2) Succession by descendants of—in natural family.

See *Custom (Succession)* (10).

... ..

No. 49 P. R. 1912.

(3) Succession by—to occupancy holding.

See *Custom (Adoption)* (2).

... ..

No. 88 P. R. 1912.

ADOPTION.

(1) Of second son in life-time of first adopted son.

See *Hindu Law.* (3).

... ..

No. 46 P. R. 1912.

(2) Effect of adoption (alienation by way of adoption) discussed.

See *Custom (Alienation)* (8).

... ..

No. 63 P. R. 1912.

ADOPTION—concl'd.

(3) Not allowed by Muhammadan Law—limitation for suit for possession when adoption is set up.

See *Custom (Alienation)* (16).

... .. **No 126 P. R. 1912.**

See also *Custom (Adoption)*.

AGENT.

(1) Suit against heir of Agent for accounts—limitation.

See *Principal and Agent*.

... .. **No. 1 P. R. 1912.**

(2) Application for execution by agent not duly authorized who subsequently files a power-of-attorney.

See *Civil Procedure Code, 1908* (16).

... .. **No. 118 P. R. 1912.**

AL AULAD.

Meaning of—

See *Succession*.

... .. **No. 76 P. R. 1912.**

APPEAL.

(1) Order setting aside award of arbitrators, though not appealable, may be attacked in appeal from the decree.

See *Civil Procedure Code, 1908* (9).

... .. **No. 97 P. R. 1912**

(2) From order of Appellate Court in an appeal from an order allowed by rules of Code of Civil Procedure.

See *Civil Procedure Code, 1908* (8).

... .. **No. 119 P. R. 1912.**

(3) From order filing an award which has been followed by a judgment and decree.

See *Civil Procedure Code, 1908* (7).

... .. **No. 123 P. R. 1912 (F. B.).**

(4) From order superseding arbitration, not falling under schedule II, clause (a), of Code of Civil Procedure.

See *Civil Procedure Code, 1908* (6).

... .. **No. 125 P. R. 1912**

ARBITRATION.

(1) *Agreement to submit—bar to suit—Specific Relief Act, I of 1877, section 21 (last clause)—not applicable to submissions falling within section 3, Indian Arbitration Act, IX of 1899—applications for*

ARBITRATION—*conclld.*

stay of suit under section 19 of that Act and section 18, Schedule II, Civil Procedure Code, 1908, necessary.

Held, that in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could have been instituted in a Presidency town, the last 37 words of section 21 of the Specific Relief Act do not apply (*vide* sections 2 and 3 of the Indian Arbitration Act)

And, consequently, as defendant had made no application to stay the suit under section 19 of the Arbitration Act or under section 18, Schedule II of the Civil Procedure Code, the agreement to refer to arbitration was no bar to the present suit.

... .. **No. 37 P. R. 1912.**

(2) Application to submit to—by guardian or next friend of a minor, requires express sanction of Court.

See Civil Procedure Code 1908 (21).

... .. **No. 95 P. R. 1912 (F. B.).**

(3) Agreement to submit to—made out of Court during pendency of suit.

See Specific Relief Act (2).

... .. **No. 115 P. R. 1912.**

AWANS.

Talagang *Tahsil*—alienation—in presence of father and step-brothers.

See Custom (Alienation) (15).

... .. **No. 100 P. R. 1912.**

B

BAJWA JATS.

Pasrur *Tahsil*—Sialkot District—succession by descendants of adopted son in natural family.

See Custom (succession) (10).

... .. **No. 49 P. R. 1912.**

BANGA.

Pre-emption prevails in town of—

See Custom (Pre-emption) (4).

... .. **No. 71 P. R. 1912.**

BANIAS.

Delhi District—validity of adoption of sister's son.

See Custom (Adoption) (2).

... .. **No. 83 P. R. 1912.**

BENAMI PRE-EMPTION.

Where vendee instigated pre-emptor to sue and advanced the money for it.

See *Punjab Pre-emption Act* (8).

... .. No. 58 P. R. 1912.

BENAMI PRE-EMPTOR.

Court not concerned with questions, where pre-emptor is raising the money or what he is going to do with the land.

See *Pre-emption* (1).

... .. No. 7 P. R. 1912.

BUILDING LEASE.

See *Laudlord and Tenant*.

... .. No. 121 P. R. 1912.

C

CAUSES OF ACTION.

See *Civil Procedure Code*, 1908 (12).

... .. No. 104 P. R. 1912.

CHARITABLE BEQUEST.

Trust to spend income on dharmarth—not enforceable—conduct of heir in joining in the trust as one of the trustees and allowing it to proceed for some years—estoppel.

One R. S. made a will by which he left certain property on trust to spend the income on *dharmarth* and appointed seven persons as trustees to administer the same, one of them being his heir. Shortly afterwards the testator died. He had during his life-time established a *langar* to supply food to the poor, and for some years after his death the trustees carried this on, until the heir prevented further funds being spent for the purpose. The surviving trustees thereupon brought the present suit against the heir under section 539, Civil Procedure Code, 1882.

Held, following *Runchardas v. Parvatibai*, (1898) I. L. R. 23 Bom. 725 (P. C.), that the bequest for such wide and vague purposes as distribution on *dharmarth* is void and the property designated for the purpose must be held to be undisposed of.

Held also, that the fact that the defendant accepted and joined in the trust and allowed it to proceed for six years, did not estop him from denying its validity now.

... .. No. 78 P. R. 1912.

CHELAS (DADUPANTHI).

Forfeiture of property on marriage.

See *Custom (Chelas)*.

... .. No. 77 P. R. 1912.

CIVIL PROCEDURE CODE, 1882.

(1) SECTION 17, EXPLANATION III.

Suit against Railway Company in Bengal on contract made with N.-W. Railway at Ludhiana in regard to through-booked traffic.

See *Indian Railways Act*.

... .. **No. 111 P. R. 1912.**

(2) SECTION 283.

Proviso to section 42, Specific Relief Act, not applicable to suit under—

See *Specific Relief Act* (4).

... .. **No. 10 P. R. 1912.**

(3) SECTION 462.

Decree passed on compromise by guardian without compliance of section 462—suit by minor to recover property.

See *Guardian and Minor*.

... .. **No. 2 P. R. 1912.**

(4) SECTIONS 506 AND 462.

Application by guardian or next friend of a minor—leave of Court must be expressly given.

See *Civil Procedure Code*, 1908 (21).

... .. **No. 95 P. R. 1912 (F. B.).**

(5) SECTIONS 506, 523 AND 525.

Applicable only where there is no pending litigation.

See *Specific Relief Act* (2).

... .. **No. 115 P. R. 1912.**

CIVIL PROCEDURE CODE, 1908.

(1) SECTION 2 AND ORDER 7, RULE 11.

See *Revision (Civil)* (1).

... .. **No. 69 P. R. 1912.**

(2) SECTION 11 AND ORDER 2, RULE 2.

Previous suit decreed as against some defendants and dismissed as regards the others on the ground that there was no cause of action against them—fresh suit against the latter, not barred.

Plaintiffs representing one branch of the proprietors of a joint holding, sued the representatives of the other branch, including some persons who had purchased part of their share, for a declaration that partition should be in accordance with entries of Settlement of 1869 and not with the entries of 1879. The defendants-purchasers came to a compromise with plaintiffs, to the effect that plaintiffs were entitled to 41 *kanals* 18 *marlas*, the purchasers to 20 *kanals* and the other

CIVIL PROCEDURE CODE, 1908—*contd.*

defendants to 27 *kanals* 11 *marlas*. The latter objected to the terms of the compromise and the Court thereon gave plaintiffs a decree in terms of the compromise against the defendants-purchasers to the effect that they were only entitled to 20 *kanals*; and dismissed the claim as regards the other defendants on the ground that no cause of action had been shown against them, adding that plaintiffs are at liberty to bring another suit against them.

Plaintiffs then brought the present suit against the defendants, against whom their previous suit had been dismissed, impleading the purchasers as co-defendants.

Held, following 66 P. R. 1884 (*Bhola Singh v. Gurdit Singh*) and *Parsotam Gir v. Narbada Gir*, (1899) I. L. R. 21 All. 505 (514), that the suit was not barred either under section 13 or order 2, rule 2 of the Civil Procedure Code of 1903.

... .. No. 56 P. R. 1912.

(3) SECTION 16 (c).

See *Jurisdiction* (2).

... .. No. 55 P. R. 1912.

(4) SECTION 47.

Donee of property from judgment-debtor under money-decree, not latter's representative—separate suit by decree-holder to have gift declared void, maintainable.

Where a judgment-debtor under a money-decree, while application for execution was pending, transferred the whole of his property to his wife by way of gift—

Held, that a suit by the decree-holder to have the gift declared void was not barred by section 47, Civil Procedure Code, 1908, the donee not being a “representative” of the judgment-debtor within the meaning of that section.

Madho Das v. Ramji Patak, (1894) I. L. R. 16 All. 286, followed.

Ishan Chunder Sirkar v. Beni Madhub Sirkar, (1896) I. L. R. 24 Cal. 62 (F. B.), *Dwar Buksh Sirkar v. Fatik Jali*, (1898) I. L. R. 26 Cal. 250, *Akhoy Kumar Soor v. Bejoy Chand Mohatap*, (1902) I. L. R. 29 Cal. 813 and *Surendra Narain Singh v. Gopi Sundari Dasi*, (1905) I. L. R. 32 Cal. 1031, distinguished.

Held also, that as the gift was found to have been a mere sham, effected with the object of trying to save the judgment-debtor's property from the decree-holder, the latter's suit must succeed.

... .. No. 64 P. R. 1912

(5) SECTION 60.

Execution of decree—fine paid into Court in a criminal case against judgment-debtor, attachable after order inflicting fine has been set aside.

Held, that money paid into Court as a fine in a criminal case is, after the order imposing the fine has been set aside, attachable under

CIVIL PROCEDURE CODE, 1908—*contd.*

section 60 of the Civil Procedure Code, as money belonging to the judgment-debtor.

Mothiar Mira Taragan v. Ahmatti Ahmed Pillai, (1905) *I. L. R.* 29 *Mad.* 232 referred to.

... .. **No. 89 P. R. 1912.**

(6) SECTION 104 (1) (a).

Appeal from order superseding arbitration, because arbitrator seemed to be of opinion that case was premature—material irregularity—revision.

This was an application for revision from the order of the District Judge setting aside the appointment of one R. as an arbitrator, on the ground that he had apparently formed an opinion to the effect that the case was premature.

Held, that no appeal was competent under section 104 (1) (a) of the Code of Civil Procedure, the arbitration not having been superseded under schedule II, clause 8.

Held also, that the order being materially irregular was open to revision and must be set aside, there being no authority for the procedure adopted by the Court below.

37 *P. R.* 1895 (*Hira v. Dina*), referred to.

... .. **No. 125 P. R. 1912.**

(7) SECTION 104 (1) (f) AND SCHEDULE II, PARA. 21 (2).

Appeal from order filing an award, when decree has been made in accordance with it.

Held, that an appeal is competent under section 104 (1) (f) of the Code of Civil Procedure, from an order filing an award, notwithstanding that the order has been followed by a judgment and a decree in accordance with the award, and that no appeal lies from such a decree (*vide* para. 21 (2) of the second schedule)

Junokey Nath Guha v. Brojo Lal Guha, (1906) *I. L. R.* 33 *Cal.* 757 (*F. B.*), 27 *P. R.* (*Cr.*) 1910 (*F. B.*) (*In the matter of a pleader*) and 1 *P. R.* 1908 (*F. B.*) (*Shankar Mal v. Nathu Mal*), referred to.

... .. **No. 123 P. R. 1912 (F. B.)**

(8) SECTION 104 (2).

Further appeal from order of Appellate Court in an appeal from an order allowed by the rules of the Code—revision.

The plaint in this case was presented in the Court of the District Judge of Ludhiana, who, holding that the Ludhiana Court had no jurisdiction, returned it for presentation to the proper Court under order 7, rule 10, Code of Civil Procedure. Appeal was made to the Divisional Court, which held that the Ludhiana Court had jurisdiction and remanded the case under order 41, rule 23, for trial on the merits.

CIVIL PROCEDURE CODE, 1908—*contd.*

Held, that under section 104 (2), Code of Civil Procedure, no appeal is competent from the order of the Divisional Court, it being an order in an appeal allowed by rule 1 (a), order 43, of the Code.

Narbat Singh v. Baldeo Singh, (1911) *I. L. R.* 33 *All.* 479 and 147 *P. L. R.* 1911 (*Mannu Lal v. Harcharan Das*), followed.

50 *P. R.* 1911 (*Fuiz Ahmad v. Badar Din*), referred to.

Held also, that the order is not open to revision.

4 *P. R.* 1911 (*Sardar Arur Singh v. Bua Ditta*), referred to.

... .. No. 119 *P. R.* 1912.

(9) SECTION 105 (1).

Order setting aside award of arbitrators, though not appealable, may be attacked in appeal from the decree.

Held, that an order setting aside an award of arbitrators, though not appealable, may be attacked in the appeal from the decree in the case, *vide* section 105 (1), Civil Procedure Code, 1908.

72 *P. R.* 1881 (*Sher Jang v. Maihun*), and *Achnuthya v. Thimmayya*, (1908) *I. L. R.* 31 *Mad.* 345, followed.

Ganga Prasad v. Kura, (1906) *I. L. R.* 28 *All.* 408, dissented from.

... .. No. 97 *P. R.* 1912.

(10) SECTION 114.

Review—not applicable to Guardian and Wards Act.

See *Guardian and Wards Act* (2).

... .. No. 116 *P. R.* 1912.

(11) SECTION 148.

Extension of period fixed in a decree for payment of a sum of money.

Held, that the general provisions of section 148 of the Civil Procedure Code, 1908, relate only to proceedings antecedent to the passing of a final decree and are not intended to give a Court power to alter the terms of a decree already passed, and that the period fixed in a decree for the payment of a certain sum of money consequently cannot be extended under this section.

Held also, that the Court passing the decree was *functus officio* as an original Court and that the general rule is that no executing Court can vary a decree except by consent of parties.

Bibi Sharafan v. Mahomed Habib-ud-din, (1911) 15 *Cal. W. N.* 685 (690) and *Narendra Bahadur Singh v. Ajudhia Prasad*, (1909) 5 *Indian Cases* 443, followed.

... .. No. 99 *P. R.* 1912.

(12) ORDER 2, RULE 2.

No bar to separate suits for possession of land and recovery of purchase-money under same contract—different causes of action.

On 29th July 1907 one B. R. sold 6 *bighas* 3 *kanals* of land to D. On 12th November 1907 B. R. sued to have the sale cancelled on the

CIVIL PROCEDURE CODE, 1908—*contd.*

ground that the sale was made when he was a minor. On 13th January 1908 the Court of first instance decreed B. R.'s claim. On 28th January 1908 B. R. sold the 6 *bighas* 3 *kanals* to L. D. and his brother, together with 2 *bighas* 1 *kanal* for Rs. 590, and in the sale deed it was stipulated that if there was any legal defect in the title to the property sold, the vendees could recover the purchase-money together with interest. Subsequently D. who had appealed against the judgment of the 13th January 1908 was successful and the sale to him of the 6 *bighas* 3 *kanals* was upheld and B. R.'s suit dismissed.

B. R. then refused to give up to L. D. and his brother the remaining 2 *bighas* 1 *kanal* sold to them. Thereon L. D. filed the two present suits, *viz.*, one for recovery of his share in the sale price of the 6 *bighas* 3 *kanals* taken by D. and the other for possession of his one-half share of the remaining 2 *bighas* 1 *kanal* sold to him and his brother by the deed of 28th January 1908.

Held, that the causes of action in the two suits were different and that consequently neither was barred by order 2, rule 2, Civil Procedure Code.

Hannan Kamat v. Hanuman Mandur, (1887) *I. L. R.* 15 *Cal.* 51 (53).

... .. No. 104 P. R. 1912.

(13) *Order 6, rule 14, and order 29, rule 1—suit by Foreign Company through its agent in India.*

The plaintiff Company was incorporated in the United States, America, the plaint was signed and verified by their agent at Delhi, who had been appointed by, and held a power-of-attorney from, the Company's general attorney and agent in British India.

Held, that both under the power-of-attorney and also as a "principal officer" of the Company, the Delhi agent was authorised to sign and verify the plaint under order 6, rule 14 and order 29, rule 1 of the Civil Procedure Code, respectively.

Singer Manufacturing Company v. Baij Nath, (1902) *I. L. R.* 30 *Cal.* 103, referred to.

... .. No. 8 P. R. 1912.

(14) *ORDER 9, RULE 2.*

Penal clause must be strictly construed—guardian ad litem not a defendant—suit not to be dismissed, if plaintiff shows sufficient cause—proper course, where there are minor defendants.

A suit was instituted in which some of the defendants were put down as minors under the guardianship of their father. A summons was sent to the latter, but he refused to act as guardian—a summons was then issued to the minor's mother, who also refused to act. Thereupon the Court appointed the Civil Nazir of his Court guardian *ad litem* and directed summons to issue to him. When at the hearing of the case it was found that no summons had been sent to the Nazir, as no process fee had been paid, the Court dismissed the suit under order 9, rule 2, Civil Procedure Code, 1908, and subsequently refused an application praying that the order of dismissal be set

CIVIL PROCEDURE CODE, 1908—*contd.*

aside on the ground that the process fee for a summons to the Civil Nazir was not paid, as it was not thought necessary to issue summons on an officer of the Court itself.

Held, that the cause assigned by plaintiff was good and sufficient.

Held also, that the penal provisions of order 9, rule 2, must be construed strictly, and they do not apply to the case of a guardian *ad litem*, who is not a "defendant" in the suit.

Held further, that in cases like the present the proper course is to issue summons to the minors themselves and after that for the Court to decide, whether it is necessary to appoint a guardian *ad litem*, and if so, who should be appointed; the minors having a right to be heard on that point.

Suresh Chundur Wani v. Jagut Chundur Deb, (1885) *I. L. R.* 14 Cal. 204 (215) (*F.B.*), referred to.

... .. No. 35 P. R. 1912.

(15) ORDER 21, RULE 2.

Decision by Executing Court on objection that decree has been satisfied out of Court—res judicata—maintainability of regular suit—limitation for objection—Indian Limitation Act, IX of 1908, article 174.

Held, that where, on an application for execution of a decree, the judgment-debtor objects within the 90 days prescribed in article 174 of the Limitation Act on the ground that he has satisfied the decree out of Court, and the Executing Court thereon goes into the question and decides it on the merits, the decision cannot be attacked in a regular suit.

16 P. R. 1910 (*Diwan Singh v. Amir Singh*), distinguished.

... .. No. 91 P. R. 1912.

(16) ORDER 21, RULE 17 (2).

Application for execution by agent not properly authorised, who subsequently files a power-of-attorney.

Held, that when on an application for execution, presented by agent, it was objected that the agent was not duly authorised and the former thereupon filed a power-of-attorney, the Court should not dismiss the application but treat it as having been filed on the date on which the power-of-attorney was filed, on the principle contained in order 21, rule 17 (2), Code of Civil Procedure.

105 P. R. 1882 (*Lakhmi Das v. Gobind Ram*), 23 P. R. 1883 (*Mrs. Baness v. Col. Turton*), *Fuzloor Rukman v. Altaf Hossein*, (1884) *I. L. R.* 10 Cal. 541 and *Lachman Bibi v. Patni Ram*, (1877) *I. L. R.* 1 All. 510, referred to.

... .. No. 118 P. R. 1912

(17) ORDER 21, RULE 48 (3).

Whether Government can be made liable for amounts left unattached under order of attachment on the salary of a Government officer, without being a party to the proceedings.

Held, that when, in execution of a decree, an attachment order has been made on the pay of a Government officer and the order has not

CIVIL PROCEDURE CODE, 1908—*contd.*

been complied with in full or in part, no order can be made against Government under order 21, rule 48 (3), Civil Procedure Code, before Government is on the record.

Held also, that the rule merely gives a decree-holder a remedy against Government, and leaves him to prosecute that remedy in due course.

10 P. R. 1910 (*Oakes & Co. v. Discarcie*), referred to and explained.

... ..

No. 93 P. R. 1912.

(18) *Order 41, rule 22 (4)*—*determination of cross-objection on dismissal of appeal, other than on the merits.*

Held that, except in the case of the original appeal being “with-drawn or dismissed in default” as expressly provided for in order 41, rule 22 (4) of the Civil Procedure Code, 1908, the general rule that cross-objections cannot be entertained, unless the appeal is decided on the merits, is still in force.

Ramjiwan Mal v. Chand Mal, (1888) I. L. R. 10 All. 587, referred to.

Held also, that an appellant who has filed his appeal on an insufficient Court-fee stamp may be allowed to amend his memo. of appeal by striking out part of his claim, on the insufficiency being pointed out to him by the Court.

Ram Prasad v. Bhiman, (1904) I. L. R. 27 All. 151 and *Arogya Udayan v. Appachi Rowthan*, (1901) I. L. R. 25 Mad. 543, referred to.

.. ..

No. 11 P. R. 1912.

(19) *SCHEDULE II, SECTIONS 1, 17 AND 20.*

Applicable only, when there is no pending litigation.

See *Specific Relief Act* (2).

... ..

No. 115 P. R. 1912.

(20) *SCHEDULE II, SECTION 18.*

See *Arbitration* (1).

... ..

No. 37 P. R. 1912.

(21) *SCHEDULE II, PARA. 1 AND ORDER 32, RULE 7.*

Application to submit to arbitration by guardian or next friend of a minor—necessity of express sanction by Court—Civil Procedure Code, 1882, sections 506 and 462.

Held, that an application of the guardian or next friend of a minor under section 506 of the former Code of Civil Procedure or under Schedule II, para. 1 of the present Code, comes within the purview of section 462 of the former Code or order 32, rule 7 of the present Code, as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement of compromise entered into by such guardian or next friend with reference to the suit, without the leave of the Court expressly recorded in the proceedings.

CIVIL PROCEDURE CODE, 1908—*concl'd.*

37 P. R. 1895 (*Hira v. Dina*), followed.

Hardeo Sahai v. Gauri Shankar, (1905) I. L. R. 28 All. 35, 4 P. R. 1907 (*Uda v. Mul Chand*), and *Annanda Krishna Dey v. Jogendra Nath Dey*, (1908) 8 Cal. L. J. R. 294, differed from.

Lakshmana Chetti v. Chinmathambi Chetti, (1900) I. L. R. 24 Mad. 326, 18 P. R. 1891 (F. B.) (*Malak Sorab v. Anokh Rai*), *Sheo Nath Saran v. Sukh Lal Singh*, (1899) I. L. R. 27 Cal. 229, *Chengal Reddi v. Venkata Reddi*, (1889) I. L. R. 12 Mad. 483, 3 P. R. 1905 (*Ghulam Ali Shah v. Shahabul Shah*), and 3 P. R. 1912 (*Badri Das v. Santa Singh*), referred to.

... .. No. 95 P. R. 1912 (F. B.).

COMPENSATION.

For causing death of a person—claimable against whom—proof required in Civil Court.

See *Act XIII of 1855*.

.. ... No. 117 P. R. 1912.

CONSIDERATION.

Gift to wife on account of natural love and affection, not for—

See *Transfer of Property Act*.

... .. No. 74 P. R. 1912.

CONSTRUCTION OF WILL.

By Hindu—in favour of daughters.

See *Will* (4).

... .. No. 65 P. R. 1912.

CONTRACT.

By person of unsound mind.

See *Indian Contract Act*.

... .. No. 41 P. R. 1912.

CONVERT.

Powers of collaterals to challenge alienations, not affected by alienor's conversion to Christianity.

See *Custom (Alienation)* (11).

... .. No. 75 P. R. 1912.

COURT-FEE.

(1) Appeal filed on insufficient Court-fee—appellant at liberty to reduce his claim in appeal, if he wishes it.

See *Civil Procedure Code*, 1908 (18).

.. ... No. 11 P. R. 1912.

COURT-FEE—*contd.*

(2) Procedure where Appellate Court finds plaint or memorandum of appeal has been insufficiently stamped in lower Court.

See *Court-fees Act* (1).

... .. No. 109 P. R. 1912 (F. B.).

COURT-FEES ACT.

(1) SECTIONS 10 (ii) AND 12 (ii).

Procedure of Appellate Court, when plaint or memorandum of appeal is found to have been insufficiently stamped in lower Court and there was no special order on the point.

Held, that where it is found in an Appellate Court that the Court-fee on a plaint or memorandum of appeal, as the case may be, in the Court below was insufficient, it is the duty of the Appellate Court to call upon the party whose fee was in defect, to make good the deficiency under section 12 (ii) of the Court-fees Act, although no dispute as to the amount had arisen or been specially decided in the Lower Court.

115 P. R. 1884 (*Mela Mal v. Harbhaj*) and 13 P. R. 1901 (*Kaka Ram v. Ram Sam*), overruled.

Narain Singh v. Chaturbhuj Singh, (1898) I. L. R. 20 All. 362, *Madan Lal v. Jai Kishan Das*, All. W. N. (1905) 277 and *Mohan Lal v. Nand Kishore*, (1905) I. L. R. 28 All. 270 (F. B.), followed on this point.

Held also, that if the deficiency is not paid within such time as the Appellate Court shall fix, the suit or appeal of the defaulting plaintiff or appellant, as the case may be, should be dismissed under the provisions of section 10 (ii) of the Act.

Madan Lal v. Jai Kishan Das, All. W. N. (1905) 277, followed, and *Narain Singh v. Chaturbhuj Singh*, (1898) I. L. R. 20 All. 362 and *Mohan Lal v. Nand Kishore*, (1905) I. L. R. 28 All. 270 (F. B.), dissented from on this point.

... .. No. 109 P. R. 1912 (F. B.).

(2) SCHEDULE II, ARTICLE 17, CLAUSE VI.

Court-fee on appeal with object of getting other defendants made liable for amount decreed by first Court against one only.

Where the Lower Court granted the plaintiffs a decree against one of several defendants and the plaintiffs appealed with the object of getting the other defendants made jointly liable for the amount decreed—

Held, that the memorandum of appeal must bear an *ad valorem* Court-fee stamp on the amount decreed by the Lower Court, and that article 17, clause VI of the II schedule of the Court-fees Act was not applicable.

... .. No. 86 P. R. 1912.

CROSS-OBJECTION.

When entertainable, if appeal is not decided on merits.

See *Civil Procedure Code*, 1908 (18).

... .. No. 11 P. R. 1912

CUSTOM (ADOPTION).

(1) Effect of adoption (alienation by way of adoption) discussed.

See *Custom (Alienation)* (8).

... .. **No. 63 P. R. 1912.**

(2) *Of sister's son—valid among non-agricultural Banias, Delhi district—Hindu Law—Succession by such adopted son to occupancy holding—Punjab Tenancy Act, XVI of 1887, section 59.*

Held, that among non-agricultural Banias, Delhi district, adoption of a sister's son is valid.

24 P. R. 1900 (*Harnaman v. Atma Ram*), 69 P. R. 1907 (*Muhammad Din v. Jawahir*), 86 P. R. 1904 (*Chuttan v. Ram Chand*), 99 P. R. 1909 (*Mansa v. Surta*), and *Bhagwan Singh v. Bhagwan Singh*, (1898) I. L. R. 21 All. 412 (P. C.), referred to.

Held also, that such an adopted son succeeds to an occupancy holding of his deceased adoptive father under section 59 of the Punjab Tenancy Act.

34 P. R. 1883 (F. B.) (*Dul v. Bhag Sing*), followed.

... .. **No. 88 P. R. 1912.**

CUSTOM (ALIENATION).

(1) *Of land in lieu of dower—Pathans, Rawalpindi district—Riwaj-i-am, question 46—dower—amount of—*

Held, that the answer to question 46 recorded in the *Riwaj-i-am* of the Rawalpindi district must be held to mean that a Pathan can give to his wife in payment of her dower a part of his land *more or less equal in value* to that dower, as promised or fixed.

Held also, that when it is not proved, that any sum was fixed as dower, the *sharai* dower must be presumed.

... .. **No. 12 P. R. 1912.**

(2) *Muhammadan Jats, Lahore tahsil—gift by female in possession—locus standi of son of the sister of last male holder's father to contest the gift—status of female heirs to challenge alienations—Riwaj-i-am.*

Held, that unless the custom of the tribe recognises a female and her issue as heirs, the right of controlling alienations even by a female does not extend beyond the line of agnatic heirs.

19 P. R. 1906 (*Chiragh Bibi v. Hassan*), 61 P. R. 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*), 93 P. R. 1906 (*Natha Singh v. Mohan Singh*), 135 P. R. 1908 (*Magsud-ul-Nissa v. Kaniz Zohra*), (1900) 1 P. L. R., 301-302 (*Makhan v. Mussammat Lali*), referred to.

63 P. R. 1908 (*Waryaman v. Hira Nand*), differentiated.

Held also, that by the customary law of the Lahore district among Jats, a daughter and a sister have no right of inheritance and *a fortiori* the son of the sister of the last male holder's father, and the latter is consequently not competent to challenge a gift made by the mother of the last male holder then in possession.

134 P. R. 1907 (F. B.) (*Hamira v. Ram Singh*) and 120 P. R. 1909 (*Mussammat Nasib-ul-Nissa v. Mansur Ali*), referred to.

... .. **No. 13 P. R. 1912.**

CUSTOM (ALIENATION)—*contd.*

(3) *Status of remote collaterals (next in succession) to contest alienations of ancestral property.*

Held, that collaterals in the 11th degree (though next in succession) have no right to contest alienations of ancestral property in the absence of proof of a special custom, entitling them to deprive the alienor of the right to select his own successor or representative in estate.

119 P. R. 1883 (*Muhammad v. Jahan Khan*), 69 P. R. 1887 (*Dula Singh v. Wazir Singh*), 107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*), 20 P. R. 1890 (*Mangal v. Chetu*), 79 P. R. 1891 (*Ala Bakhsh v. Buta*), 50 P. R. 1893 (F. B.) (*Ralla v. Budha*), 75 P. R. 1898 (*Arur Singh v. Mussammat Lachmi*), 35 P. R. 1906 (*Khazan Singh v. Relu*), 93 P. R. 1906 (*Natha Singh v. Mohan Singh*), 23 P. R. 1907 (*Hira Singh v. Karam Kaur*), 162 P. L. R. 1901 (*Sawan Singh v. Hannaman*) and 94 P. L. R. 1903 (*Hardas Singh v. Buta*), referred to.

... .. No. 24 P. R. 1912.

(4) *Status of collaterals in sixth and seventh degree, in presence of daughters, to challenge alienations—Pathans, Mianwali tahsil—Riwaj-i-am.*

Held, that it had not been proved that, by custom among Pathans of the Mianwali tahsil, collaterals in the sixth and seventh degree have a right to sue for possession of alienated land in presence of daughters of the alienor.

5 P. R. 1908 (*Abdul Karim v. Sahib Jan*) and 86 P. R. 1908 (*Bholi v. Man Singh*), referred to.

Held also, that the method of computing relationships among these Pathans is to count from the collaterals to the common ancestor, both being included.

48 P. R. 1908 (*Girdhari Ram v. Faizullah Khan*), followed.

... .. No. 29 P. R. 1912.

(5) *Village abadi—right of qabza maliks to sell their houses.*

Held, that a *malik qabza*—having full proprietary rights over the cultivated lands in his possession as *malik* (owner)—has presumably the same rights (in the absence of proof to the contrary) over his house in the village site (*abadi*), and that therefore the *ala maliks* had no right to interfere with the sale of such a house.

Held also, that an entry in the *Wajib-ul-arz*, restricting the powers of non-proprietors in regard to their houses, has no application to *qabza maliks*.

67 P. R. 1869 (*Kirpal Singh v. Kesree*), referred to.

... .. No. 39 P. R. 1912.

(6) *Gift to minor daughter—completion of gift by possession—right of daughter's husband (a khana-damud) to retain property for his life after her death—Gujars of Gujrat district.*

Held, that when a gift has been made to a minor daughter, for whom the donor acted as guardian, the daughter's husband cultivating the donor's land and living with him in his house and being regarded

CUSTOM (ALIENATION)—*contd.*

at the time in the light of a son, and the donor had openly affirmed the gift in a Court of law, shortly after which he died (his death being probably the reason why mutation of names had not been effected)—formal delivery of possession was not essential to the completion of the gift.

45 P. R. 1881 (*Gul Ahmed v. Sahibzada*), 86 P. R. 1882 (*Ghulam Muhammad v. Muhammad Amin*), 91 P. R. 1883 (*Faujdar v. Bhamma*), 36 P. R. 1891 (*Ahmad Khan v. Mussammatt Ghulam Bibi*), 98 P. R. 1895 (*Khan v. Hira*) and 106 P. R. 1901 (*Samman v. Ala Bakhsh*), referred to.

Held also, that among tribes which recognise the custom of *khana-damad* (such as Gujars of the Gujrat district) the object of a gift to a daughter is to benefit both the daughter and her *khana-damad* husband and any issue of theirs and consequently the husband is entitled to hold the gifted property for his life after the death of his wife without issue, although she predeceased her father (the donor).

12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*), 22 P. R. 1893 (*Ghulam Bhikh v. Massania*), 54 P. R. 1897 (*Bhotu v. Lehru*), 134 P. R. 1894 (*Mahla v. Shah Muhammad*), 39 P. R. 1905 (*Nawab Khan v. Kallu Khan*), followed.

... .. No. 40 P. R. 1912

(7) *Status of female heir to challenge alienation of ancestral property by her paternal grandfather—validity of transfer of right to contest the alienation by her father's will—Pathans of Miani, Hoshiarpur district.*

Held, that it had not been proved that among Pathans of Miani, Hoshiarpur district, a daughter of the son of a male alienor is entitled to object to the alienation by him of ancestral immovable property to a son-in-law, even though the said daughter's father had in a will bequeathed to her the right to raise such objection and to sue for recovery of the said property.

66 P. R. 1897 (F. B.) (*Tota v. Abdullah Khan*), 22 P. R. 1900 (*Mauladad v. Ram Gopal*), 67 P. R. 1909 (*Jawala Sahai v. Ram Singh*), followed.

11 P. R. 1907 (*Sher Singh v. Sidhu*), 19 P. R. 1906 (*Chiragh Bibi v. Hassan*), 72 P. R. 1906 (*Lahori v. Radho*), *Atul Krishna Sircar v. Sanyasi Churn Sircar*, (1905) I. L. R. 32 Cal. 1051, *Radha Prasad Mullick v. Rani Mani Dasee*, (1906) I. L. R. 33 Cal. 947, *Padam Lal v. Tek Singh*, (1906) I. L. R. 29 All. 217, 93 P. R. 1905 (*Atma Singh v. Kalu*), and 12 P. R. 1901 (*Nawab-ud-din v. Mussammatt Kami*), distinguished.

... .. No. 47 P. R. 1912.

(8) *Alienation by way of adoption—power of collaterals to contest such alienation in regard to non-ancestral property—effect of adoption discussed.*

Held, that under customary law a childless proprietor has the power of alienating his property, if non-ancestral, *qua* his collaterals, in any way he pleases and that consequently the collaterals of such a proprietor are not entitled to obtain possession of his non-ancestral land to which a person adopted by him has succeeded by virtue of his adoption, even though *per se* the validity of the adoption may be open to question.

CUSTOM (ALIENATION)—*contd.*

In such cases adoption has the same effect as a gift of his land by the adoptive father to the adopted son.

The effect of adoption under customary law discussed.

170 P. R. 1882 (*Chamba v. Jowahir Singh*), 130 P. R. 1884 (*Mussammat Talia Bibi v. Mussammat Budh*) and 50 P. R. 1893 (*F. B.*) (*Ralla v. Budha*) referred to.

... .. No. 63 P. R. 1912.

(9) *Alienation by female in possession—assented to by father of plaintiff, who sues for a declaration that it shall not affect his reversionary rights.*

Held, that the assent of plaintiff's father to the alienation by a female in possession, if made *bonâ fide*, without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights.

7 P. R. 1905 (*Labhu v. Mussammat Nihali*), referred to.

... .. No. 68 P. R. 1912.

(10) *Muhammadan Sahu Jats, mauza Chaupratha, Multan district—unrestricted power of alienation in presence of a son—Riwaj-i-am.*

Held, that it had been proved that, by custom among Muhammadan Sahu Jats of mauza Chaupratha in the Multan district, a proprietor has full power of alienation, irrespective of any question of necessity and that his action cannot be challenged by his son.

107 P. R. 1887 (*F. B.*) (*Gujar v. Sham Das*), and 73 P. R. 1895 (*F. B.*) (*Ramji Lal v. Tej Ram*), referred to.

... .. No. 73 P. R. 1912.

(11) *Powers of collaterals to challenge alienation, not affected by alienor being a convert to Christianity.*

Held, that among Muhammadan Rajputs of the Jullundur district the customary powers of collaterals to challenge an alienation are not affected or destroyed simply by the conversion of the alienor to Christianity.

36 P. R. 1909 (*Mukerji v. Alfred*), distinguished

... .. No. 75 P. R. 1912.

(12) *Quraishi Sheikhs of gasba Thoru, tahsil Nuh, Gurgaon district—Muhammadun Law—Riwaj-i-am.*

Held, that Quraishi Sheikhs of gasba Thoru, tahsil Nuh, Gurgaon district, are governed by custom and not by their personal law, and that consequently a gift made by a widow in favour of one of the collaterals of her deceased husband, to the exclusion of the others, was invalid

... .. No. 79 P. R. 1912.

(13) *Kalals of mauza Kalal Hatti, Ambala district, governed by custom and not Hindu Law.*

Held, that Kalals of mauza Kalal Hatti, Ambala district, are governed in matters of alienation by custom and not their personal law.

... .. No. 81 P. R. 1912.

CUSTOM (ALIENATION)—*contd.*

(14) *Will devising ancestral property by childless proprietor in favour of his sister in presence of collaterals in sixth degree—Kassars of mauza Mangalwal, tahsil Chakwal, district Jhelum—Riwaj-i-am.*

Held, that by custom among Kassars of mauza Mangalwal, tahsil Chakwal in the Jhelum district, a childless proprietor can by will devise the whole of his ancestral property to his sister in presence of distant collaterals in the sixth degree.

48 P. R. 1903 (F. B.) (*Mussammatt Bano v. Fateh Khan*), 17 P. R. 1867 (*Khoda Dad v. Bukshum*), 50 P. R. 1902 (*Haidar Khan v. Jahan Khan*), 34 P. R. 1905 (*Hayat v. Hidayat*), 107 P. R. 1893 (*Bakshi v. Rahim Dad*) and 68 P. R. 1911 (*Lachhman v. Bhagwan Sahai*), referred to.

... .. **No. 98 P. R. 1912.**

(15) *Awans—Talagang tahsil—Riwaj-i-am—Jhelum district.*

Held, that by custom among Awans of the Talagang tahsil, a childless proprietor has the power to alienate ancestral property to a near collateral in the presence of his father (who had gifted the land to him in his lifetime) and step brothers, even without necessity.

79 P. R. 1896 (*Bakhsha v. Mir Baz*), 53 P. R. 1899 (*Devi Das v. Bhakra*), 46 P. R. 1900 (*Nura v. Tora*), 8 P. R. 1906 (*Khudayar v. Fatteh*), 15 P. R. 1907 (*Amir Ali v. Buggo*) and 88 P. R. 1911 (*Khuda Bakhsh v. Waham Ali*), referred to.

... .. **No. 100 P. R. 1912.**

(16) *Gift of ancestral land by father to daughter—estate taken by donee—Ansari Sheikhs of Basti Danishmandan, Jullundur District—evidence and proof of custom—suit for possession—limitation—Indian Limitation Act, XV of 1877, schedule II, article 118—ineffective adoption—Muhammadan Law*

The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners. The defence was that the respondent was in possession under a gift from the last owner, a Muhammadan lady, who had adopted him as her heir, and who had herself received the property in dispute as a gift from her father in lieu of her mother's dower; and that the suit was barred by limitation. The parties were Sheikh Ansaris of Basti Danishmandan, Jullundur district, and the appellants' case was that according to a custom prevailing in the family no woman could take by gift a greater interest in ancestral property than an estate for life, without power of alienation, and that the gift to the respondent was therefore void.

Held, that the plaintiff had failed to prove the alleged family custom which limited the estate in ancestral lands, which came to a daughter by gift, to a mere life estate and which prevented a daughter from alienating such lands by gift in her lifetime and that evidence of a custom as to limited rights of a widow in her deceased husband's property, or evidence of a custom preventing a Muhammadan father from giving his property to one son to the exclusion of another, had no bearing on the issue.

CUSTOM (ALIENATION)—*concl'd.*

Seemle, that the omission to bring within the period prescribed by article 118 of the second schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never in fact took place, is no bar to a suit like this for possession of property.

Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh, (1906) *I. L. R.* 28 All. 727 (P. C.); *L. R.* 33 I. A. 156, followed.

Under the general Muhammadan Law an adoption cannot be made, and even if it be made, can carry with it no right of inheritance.

... .. No. 126 P. R. 1912 (P. O.).

CUSTOM (CHELAS).

Custom—*Dadupanthi chelas*—*whether marriage causes forfeiture of the property given to chela for his maintenance—onus probandi.*

Held, that plaintiff, on whom the *onus* was, had failed to prove that by custom a *Dadupanthi chela* in the Ferozepore district, who belonged to a shrine situate in the Hoshiarpur district, forfeits, by taking a wife, his rights to property given to him for his maintenance.

... .. No. 77 P. R. 1912.

CUSTOM (PARTITION).

Widow's right to have joint holding partitioned—*Punjab Land Revenue Act, XVII of 1887, section 111*—*Baloches of Mozang near Lahore.*

Held, that a widow of a deceased co-sharer in a joint holding has a statutory right to demand partition and although a suit for a declaration that she is not so entitled, is competent in a Civil Court (*vide* 82 P. R. 1898 (F. B.) (*Buta v. Mussammat Jiwani*), the plaintiff can only succeed, by proving a custom by which widows are restrained from claiming partition and no consideration of desirability or undesirability should have any weight with the Court.

Held also, that the plaintiff in the present case had failed to prove such a custom among Baloches of *mauza Mozang* near Lahore.

5 P. R. 1868 (*Talewund Khan v. Mussammat Khanzadee*), 93 P. R. 1869 (*Attar Singh v. Mussammat Partapee*), 28 P. R. 1870 (*Kahn Singh v. Mussammat Prem Kour*), 22 P. R. 1878 (*Ranjha v. Mussammat Rajji*) and 65 P. R. 1881 (*Mussammat Mansoman v. Abdul Kadir Khan*), referred to

... .. No. 70 P. R. 1912.

CUSTOM (PRE-EMPTION).

(1) *Existence of*—*in town of Urmar—at time when Punjab Pre-emption Act, II of 1905, came into force.*

Held, that plaintiff had failed to prove that a custom of pre-emption existed in the town of Urmar at the time when the Punjab Pre-emption Act, 1905, came into force.

... .. No. 28 P. R. 1912.

CUSTOM (PRE-EMPTION)—*concl'd.*

(2) *In town of Dasuha.*

Held, that the custom of pre-emption in respect of house property exists in the town of Dasuha, Hoshiarpur district.

... .. **No. 61 P. R. 1912.**

(3) *In Ferozepore City, kucha Nihal Singh, mohalla Multani Darwaza*

Held, that *kucha* Nihal Singh in the city of Ferozepore is comprised in *mohalla* Multani Darwaza, a sub-division of the city, in which the custom of pre-emption prevails.

44 P. R. 1903 (*Muhammad Nawaz Khan v. Mussammat Bobo Sahib*), referred to.

... .. **No. 62 P. R. 1912.**

(4) *In town of Banga—Punjab Pre-emption Act, II of 1905, section 13.*

Held, that it has been proved that the custom of pre-emption prevails in the town of Banga and that section 13 of the Punjab Pre-emption Act is, therefore, applicable to plaintiff's suit for pre-emption of a shop on the ground of vicinage.

See also *PRE-EMPTION*.

... .. **No. 71 P. R. 1912.**

CUSTOM (SUCCESSION).

(1) *To land inherited by wife from her father—husband or sister—Riwaj-i-am—Jullundur district.*

Held, that the entry in the *Riwaj-i-am* of the Jullundur district to the effect that a husband succeeds to his wife's property applies only to the wife's *stridhan* and not to land inherited by the wife in the ordinary way under Punjab Customary Law from a father, and that such land in default of male descendants reverts to the father's line, *viz.*, in the present case to deceased's sister.

12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*), referred to

... .. **No. 4 P. R. 1912.**

(2) *Jats—Lahore district—daughters and sisters do not inherit nor daughter's sons.*

See *CUSTOM (ALIENATION)* (2).

... .. **No. 13 P. R. 1912.**

(3) *Succession—heirless estates—pattidars and proprietary body—escheat to Government.*

The *Riwaj-i-am* provided that in the event of a proprietor dying without leaving any blood relation his or her land should go first to *thuladars*, then to the *pattidars* and thereafter to the proprietary body of the village. On the death of one of the proprietors heirless, his land had, however, been mutated in the names of the defendants, the *pattidars*, who were of the same tribe as deceased, to the exclusion of plaintiff who, though a *pattidar*, belonged to a different tribe and was a proprietor by purchase.

CUSTOM (SUCCESSION)—*contd.*

Held, that under the *Riwaj-i-am* plaintiff as a *pattidar* had equal rights of succession with the other *pattidars* and that the *onus* of proving that he had not, was on the latter, which *onus* they had failed to discharge.

Held also, following 2 P. R. (Rev.) 1911 (*Wazira v. Mangal*), that, as there was a distinct provision in the *Riwaj-i-am* declaring the rights of the *pattidars* and ultimately of the proprietary body to succeed to the lands of heirless owners, there was no escheat to Government.

... .. No. 16 P. R. 1912.

(4) *Succession—daughters and sisters—Pathans, tahsil Mianwali.*

Held, that by custom among Pathans, *tahsil Mianwali*, daughters and sisters can only be excluded from inheritance to their fathers and brothers by collaterals not more remote than the sixth degree.

Held also, that the general rule of computing degrees of relationships, *viz.*, from deceased to common ancestor of the claimants, the deceased and ancestor being each counted as one, must be held to apply, unless the contrary is proved, and that the plaintiffs in this case had not discharged the *onus* which lay upon them.

126 P. R. 1890 (*Ladhu v. Mussammat Daulati*), 106 P. R. 1892 (*Nur Muhammad v. Ghulam Habib*), 74 P. R. 1906 (F. B.) (*Karim Bakhsh v. Jehandad Khan*), referred to.

48 P. R. 1908 (*Girdhari Ram v. Faizullah Khan*), distinguished.

... .. No. 19 P. R. 1912.

(5) *By daughters to self-acquired property—Gariwal Jats, Ludhiana district—Riwaj-i-am.*

Held, that among Gariwal Jats of the Ludhiana district there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self-acquired property by collaterals.

29 P. R. 1911 (*Mussammat Ishar Kour v. Raja Singh*), followed.

12 P. R. 1901 (*Nawab-ud-Din v. Mussammat Kami*) and 11 P. R. 1908 (*Rajo v. Karam Bakhsh*), distinguished.

54 P. R. 1906 (p. 209) (*Maula Bakhsh v. Muhammad Bakhsh*), 102 P. R. 1901 (p. 359) (*Rahim Shah v. Hussain Shah*) and 24 P. R. 1893 (p. 131) (*Har Narain v. Mussammat Deoki*), referred to.

... .. No. 25 P. R. 1912.

(6) *Chundavand or pagvand—Salahriya Rajputs, mauza Parel, tahsil Zafarwal, district Sialkot—Riwaj-i-am.*

Held, contrary to the *Riwaj-i-am* of 1898, that it had been proved that among Salahriya Rajputs of mauza Parel, *tahsil Zafarwal*, district Sialkot, the customary rule of succession was still the *chundavand* and not the *pagvand* rule.

... .. No. 27 P. R. 1912.

CUSTOM (SUCCESSION)—*contd.*

(7) *Seghal Khatris of Eminabad, Gujranwala district—Hindu Law—partition of interest in joint Hindu family property—effect of—Riwaj-i-am—Wajib-ul-arz.*

Held, that Seghal Khatris residing in the town of Eminabad, who own no agricultural land and never carried on agriculture as a means of livelihood, are governed by Hindu Law in the matter of succession to a *haveli* in the town—the *Riwaj-i-am* (1867) of the Gujranwala district and *Wajib-ul-arz* (1856) of *manza* Eminabad not being applicable to the parties and to the property in question.

Held also, that as there had been a parole agreement between the members of the joint Hindu family to partition the *haveli* in dispute in interest and right, such partition was as effectual in law as a partition by “metes and bounds,” with the result that the character of undivided property and joint ownership was taken away from that property and it became the subject of ownership in certain defined shares.

Appovier v. Rama Subba Aiyar (1866) 11 Moo. I. A. 75, *Doorga Pershad v. Mussammatt Koondan Kover*, (1873) 13 B. L. R. 235, *Balabux v. Rukhmabai*, (1903) I. L. R. 30 Cal. 725 (P. C.), *Balkishen Das v. Ram Narain Sahu*, (1903) I. L. R. 30 Cal. 738 (P. C.), and *Parbati v. Nainihal Singh*, (1909) I. L. R. 31 All. 412 (P. C.), referred to and followed.

... .. No. 38 P. R. 1912.

(8) *Gujars—Gujrat district—khana-damad* succeeds his wife to property gifted to her by her father.

See *Custom (Alienation)* (6).

... .. No. 40 P. R. 1912.

(9) *By adopted son to property in his natural family, in preference to collaterals—Hindu Jats—Ludiana tahsil—Riwaj-i-am.*

Held, that the ordinary rule among agricultural tribes in the Punjab is that a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father.

Held also, that a corollary to this general rule is, that among many tribes it is recognised that the appointed heir and his lineal descendants have no right to succeed to any share in the family of the natural father as against other sons (and their descendants) of the latter.

100 P. R. 1906 (*Mukh Ram v. Not Ram*), referred to.

Held further, that, generally speaking, the tribes recognise a preferential right on the part of the appointed heir to succeed to the property of his natural father, where the only other claimant is the collateral heir of the latter.

Held consequently, that among Hindu Jats of *Man got* of *manza* Nangal, *tahsil* and district Ludhiana, the sons of an appointed heir were entitled to succeed to the ancestral property left by their father's natural father in preference to collaterals, notwithstanding the entry in the customary law of the Ludhiana district to the contrary, the entry not being supported by a single instance.

... .. No. 45 P. R. 1912.

CUSTOM (SUCCESSION)—*contd.*

(10) *By descendants of adopted son in natural family—Bajwa Jats—Pasrur tahsil, Sialkot district—Riwaj-i-am.*

Held, that among Bajwa Jats, Pasrur tahsil, Sialkot district, the descendants of an adopted son succeed to the ancestral property left by their father's natural brother in preference to collaterals.

68 P. R. 1898 (*Rukan Din v. Mussammat Mariam*), 59 P. R. 1906 (*Ghela v. Haider*), 100 P. R. 1906 (*Mukh Ram v. Not Ram*), and 37 P. R. 1910 (*Jhanda Singh v. Kesar Singh*), referred to.

... .. No. 49 P. R. 1912.

(11) *Self acquired property—daughter—collaterals in the third degree—Rajputs—Rupar tahsil—difference of daughter's estate by succession and under gift—reversion to donor's heirs.*

Held, that by general custom, if a male proprietor makes a gift of self-acquired property to his daughter with the intention of making her the full owner of it, she becomes full owner, but if she inherits it she takes only a limited interest for herself and her issue.

121 P. R. 1908 (page 550) (*Bahadur v. Abdullah*), referred to.

Held also, that a widow who has succeeded to her husband's property, cannot alienate it against the wishes of her reversioners, whether property was self-acquired or ancestral *qua* the reversioners, unless she transfers it to the next heir.

76 P. R. 1883 (page 245) (*Gurdit Singh v. Dittu*), 63 P. R. 1895 (*Gulab v. Mussammat Ishar Kaur*) and 58 P. R. 1899 (*Sant Singh v. Jowala Singh*), referred to.

Held also, that it had not been proved that among Rajputs of the Rupar tahsil, a daughter's son is a preferential heir to collaterals in the third degree.

Held further, that when a widow has gifted her husband's land to his daughter's son, the property goes on the death of the latter without issue not to the donee's collaterals but to the donor's heirs.

53 P. R. 1882 (*Dasaunda Singh v. Mussammat Partab Kaur*), 46 P. R. 1890 (*Aman Ali v. Mussammat Amina Begum*), differed from.

12 P. R. 1892 (*F. B.*) (*Sita Ram v. Raja Ram*), 19 P. R. 1903 (*Hayat Muhammad v. Ala Baksh*), 144 P. R. 1893 (*Mussammat Emna Begum v. Jawad Ali*), referred to.

137 P. R. 1908 (*Nihala v. Rahmatullah*) and 84 P. R. 1903 (page 322) (*Gurdit Singh v. Mussammat Prem Kaur*), distinguished.

... .. No. 52 P. R. 1912.

(12) *Heirless estate—proprietors of the Patti—escheat to Government—Riwaj-i-am—Thanesar tahsil—Wajib-ul-arz.*

One Chajju, the only Jat proprietor of the Dudhan got in mauza Rattangarh, died heirless, leaving land in Thulla Dayala of Patti Jattan of the village. Mutation was made by the Revenue authorities in favour of the proprietors of Thulla Dayala. Plaintiffs, the proprietors of the two other Thullas in Patti Jattan, then brought the present suit for a declaration that they were entitled to succeed to the land jointly with defendants, the proprietors of Thulla Dayala.

CUSTOM (SUCCESSION)—*contd.*

Held, that the general rule being that heirless land escheats to Government, the *onus* of proving that the proprietors of the whole *Patti* were entitled to succeed was on plaintiffs, notwithstanding their possession.

Held also, that neither entry in the *Riwaj-i-am* of the Thanesar *Tahsil* in favour of the proprietors of the *Patti* who are of the same *got*, nor the entry in the *Wajib-ul-arz* of the village allowing the proprietors of the village to take possession of the land of a proprietor who leaves the village and is lost sight of and has no heir—could establish the claim set up by plaintiffs and their suit must consequently fail.

102 P. R. 1906 (*Harnam Singh v. Partab Singh*), referred to.

... .. No. 57 P. R. 1912.

(13) *To ancestral property gifted to a daughter—husband or collateral—Muhammadan Jats, Nawashahar Tahsil, Jullundur District.*

Held, the parties being Muhammadan Jats of Nawashahar *Tahsil*, Jullundur District, that a resident son-in-law had no right to succeed to ancestral property gifted to a daughter (his wife) on the latter's death, in the absence of proof of the existence, in the tribe concerned, of a custom allowing the appointment of a *khana-damad*, and that consequently the plaintiff, a nephew of the deceased donor, was entitled to succeed in preference to the son-in-law.

134 P. R. 1894 (*Mahla v. Shah Muhammad*) and 50 P. R. 1893 (*F. B.*) (*Ralla v. Budha*), referred to.

... .. No. 72 P. R. 1912.

(14) *Right of widow or widow of predeceased son, in presence of a son—Gujars, Tahsil Ludhiana—Riwaj-i-am.*

Held, that it had not been proved that by custom among Gujars of *Tahsil Ludhiana* a widow was entitled to succeed to the property of her deceased husband equally with her step-son.

49 P. R. 1910 (*Amir v. Mussammat Sharf Nur*), 116 P. R. 1903 (*Elahi Bakhs v. Khewni*), and 107 P. R. 1886 (*Shada v. Mussammat Jio*), referred to.

Held also, that the widow of a predeceased son is in this respect a position even worse than that of the widow.

75 P. R. 1888 (*Mussammat Hayat Bibi v. Sultan*), 8 P. R. 1889 (*Mussammat Fazlan v. Kamman*), and 23 P. R. 1892 (*Sandal Khan v. Mussammat Akki*), referred to.

... .. No. 85 P. R. 1912.

(15) *By daughter of the uncle of last male owner—Gujars—tahsil Kharian, district Gujrat.*

Held, that the plaintiff (a daughter of the uncle of the last male owner) had failed to prove that, by custom among Gujars of *tahsil Kharian*, district Gujrat, she was entitled to succeed to certain ancestral house property on the death of the widow of the last male owner, and that the fact that she would be so entitled under Muhammadan Law did not give her the *status* to contest an alienation of it made by the widow in possession.

134 P. R. 1907 (*F. B.*) (*Hamira v. Ram Singh*), referred to.

... .. No. 90 P. R. 1912.

CUSTOM (SUCCESSION)—*concl'd.*

(16) *By widows and unmarried daughters in presence of sons—Khattars—Fatehjang Tahsil, Attock District—Riwaj-i-am—maintenance.*

Held, that it had been proved that by custom among Khattars of the Fatehjang Tahsil, Attock District, widows and unmarried daughters succeed to an equal share along with sons—the *onus probandi* being upon the widows and daughters.

Held also, that the maintenance to be allowed to the widows and daughters should not be a bare sufficiency but that the ladies of the families should be maintained in fitting circumstances, having regard to the value of the estate.

... .. No. 112 P. R. 1912.

(17) *By widows and daughters in presence of sons—Muhammadian Sheikhs, Delhi City—Muhammadian Law.*

Held, that it had not been proved that a custom prevailed among Muhammadian Sheikhs, labourers and artizans, Delhi city, excluding the widow and daughters of the last male owner from succession to his property in favour of his sons.

140 P. R. 1908 (*Mehtab-ud-din v. Abdullah*) and 23 P. R. 1897 (*Mussamat Fokhar-un-Nissa v. Malik Rahim Bakhsh*), referred to.

... .. No. 113 P. R. 1912.

CUSTOM (WILL).

Pathans of Ferozepore—Muhammadian Law—Probate and Administration Act, V of 1881, section 90—transfer of property by administrator without permission of Court—voidable—"person interested"—Judgment in rem—Indian Evidence Act, I of 1872, section 41—Dower when nominal and unenforceable.

A Pathan agriculturist of Ferozepore died childless leaving two widows, A and B, and a male collateral in the 2nd degree, C. He had made a will by which he bequeathed all his property to one of his widows A for life and after her death to the Government for charitable purposes. A obtained letters of administration. B, the other widow, then sued A for her dower—*viz.*, Rs. 60,000 and made C a co-defendant, alleging that, although he was not in possession of any part of the deceased's property, he was the rightful heir. The first Court decreed the claim. C did not defend the case nor put in an appearance. A appealed to the Chief Court, no reference being made to C. In this appeal the two widows A and B put in a compromise and the Chief Court passed a decree in accordance therewith. By this B was declared to be entitled to possession of two-fifths of the immovable property and A to three-fifths in lieu of their respective dowers. C then brought the present suit for a declaration that the alienations made by the compromise should not affect his reversionary rights after the death of A.

Held, that the compromise being equivalent to a sale and made without the previous permission of the Court, by which the letters of administration were granted, was under section 90 (4) of the Probate and Administration Act voidable at the instance of C who was a "person interested" in the property within the meaning of that section.

CUSTOM (WILL)—*conclld.*

Held also, that the previous judgment passed on the compromise was not a judgment *in rem* within the meaning of section 41 of the Indian Evidence Act and was therefore no bar to the present suit.

Yara Kalamma v. A. Naramma, (1884) 2 *Mad. H. C. R.* 276, *Kanhya Lal v. Radha Charan*, (1867) 7 *W. R.* 338, and *Jogendra Deb Roy v. Funindro Deb Roy*, (1871-72), 14 *M. I. A.* 367, referred to.

Held also, where a dower has been really promised, *i.e.*, where a sum of the money has been promised and the parties really intended it to be paid on occasion arising, the Courts will not reduce it *ad miseri cordiam* or because the husband is poor, but that where no sum is ascertained or where a sum named was clearly merely nominal, the promise will not be enforced, and as the sum of Rs. 60,000 claimed by B as her dower was apparently merely mentioned "for show" and by way of ceremony it was not a contract which could be enforced.

Held also, that it was not shown that these Pathans follow agricultural custom in the matter of wills and that, although the property dealt with in the will was not proved to be ancestral, the will being in favour of one heir to the exclusion of the others was invalid under Muhammadan Law.

110 *P. R.* 1906 (*F. B.*) (*Daya Ram v. Soheli Singh*), referred to.

... .. No. 14 P.

D

DAUGHTERS.

(1) Succession by—in presence of collaterals—Pathans, Mianwali.

See *Custom (Succession)* (4).

... .. No. 19 P. R. 1912.

(2) Succession of—to self-acquired property—Gariwal Jats, Ludhiana District.

See *Custom (Succession)* (5).

... .. No. 25 P. R. 1912.

(3) Succession of—in presence of collaterals, 6th degree—among Pathans, Mianwali *Tahsil*.

See *Custom (Alienation)* (4).

... .. No. 29 P. R. 1912

(4) Succession of—to self-acquired property—Rajputs—Rupar *Tahsil*—difference of daughter's estate by succession or under gift.

See *Custom (Succession)* (11).

... .. No. 52 P. R. 1912.

(5) Bequest to—under will by Hindu father.

See *Will* (4).

... .. No. 65 P. R. 1912.

DAUGHTERS—*concl'd.*

(6) Succession to ancestral property gifted to—

See *Custom (Succession)* (13).

... .. No. 72 P. R. 1912.

(7) Included in term *al aulad*.See *Succession*.

... .. No. 76 P. R. 1912.

(8) Succession of—among Khattars, Fatehjang *Tahsil*, in presence of sons—amount of maintenance.See *Custom (Succession)* (16).

... .. No. 112 P. R. 1912.

(9) Estate taken by—under a gift of ancestral property by father—Ansari Sheikhs, Jullundur District.

See *Custom (Alienation)* (16).

... .. No. 126 P. R. 1912 (F. B.).

DECLARATORY SUIT.

That amount of mortgage money on an occupancy holding (which has been sold to the landlord) fixed by Revenue Officer is inadequate and should be larger, maintainable.

See *Punjab Tenancy Act* (2).

... .. No. 23 P. R. 1912.

DECREE

*In suit by joint-plaintiffs—must include representative of any of the plaintiffs deceased pendente lite and such representative cannot be excluded on the ground that she has no title to share in the decree.**Held*, that where a person sued jointly with others and died during pendency of suit and the widow of his son was brought on the record as his legal representative, any decree passed in favour of the plaintiffs must include the widow as representative of one of the plaintiffs and the Court has no right to exclude her on the ground that she, personally, has no right to any share in the amount decreed.*Vithu v. Bhikna*, (1890) *I. L. R.* 15 *Bom.* 145 (147), referred to.

... .. No. 51 P. R. 1912.

DHARAT.

Suit for—against defendant who has collected it, cognisable by Civil Court—small cause.

See *Jurisdiction (Civil or Revenue Court)* (4).

... .. No. 120 P. R. 1912.

DHARMARTH.

Bequest in—not enforceable.

See *Charitable Bequest*.

... .. No. 78 P. R. 1912.

DOWER.

(1) Nominal or real—amount claimable—Pathans, Rawalpindi.

See *Custom (Alienation)* (1).

... .. No. 12 P. R. 1912.

(2) Nominal or real—amount claimable—Pathans, Ferozepore.

See *Custom (Will)*.

... .. No. 14 P. R. 1912.

E

EQUITY OF REDEMPTION.

Suit for pre-emption in respect of—where vendee has paid off the mortgage.

See *Pre-emption* (5).

... .. No. 43 P. R. 1912.

ESCHEAT

Of heirless estate to Government or succession of pattidars.

See *Custom (Succession)* (3).

... .. No. 16 P. R. 1912.

ESTOPPEL

By conduct—in regard to bequest in *dharmarth*.

See *Charitable Bequest*.

... .. No. 78 P. R. 1912.

EVIDENCE

Recorded before Munsiff, who finds subsequently that he has no jurisdiction to try the case, whether admissible before competent Court.

See *Jurisdiction* (3).

... .. No. P. R. 1912.

EVIDENCE ACT.

See *Indian Evidence Act*.

EXECUTING COURT

Cannot vary decree.

See *Civil Procedure Code*, 1908 (11).

... .. No. 99 P. R. 1912.

EXECUTION OF DECREE.

(1) Step in aid of—application to be allowed to bid at a re-auction.

See *Indian Limitation Act* (13).

... .. No. 60 P. R. 1912.

EXECUTION OF DECREE—*concl'd.*

(2) Attachment of fine paid into Court.

See *Civil Procedure Code* 1908 (5).

... .. No. 89 P. R. 1912.

(3) Liability of Government for amounts left unattached under order of attachment on the salary of Government officer.

See *Civil Procedure Code*, 1908 (17).

... .. No. 93 P. R. 1912.

F

FORECLOSURE.

Proceedings under Regulation XVII of 1806 must be strictly proved.

See *Punjab Alienation of Land Act* (3).

... .. No. 59 P. R. 1912.

FOREIGN COMPANY

Can sue through Agent or principal officer in India.

See *Civil Procedure Code*, 1908 (13).

... .. No. 8 P. R. 1912.

FORMA PAUPERIS.

Order admitting suit in—not open to revision.

See *Revision (Civil)* (2).

... .. No. 87 P. R. 1912.

FRAUDULENT TRANSFER

(1) Of property by judgment-debtor under money decree, to save it from decree-holder—void.

See *Civil Procedure Code*, 1908 (4).

... .. No. 64 P. R. 1912

(2) Gift to wife in order to defeat or delay creditor.

See *Transfer of Property Act*.

... .. No. 74 P. R. 1912.

G

GIFT.

(1) to minor daughter—formal delivery of possession not required.

See *Custom (Alienation)* (6).

... .. No. 40 P. R. 1912.

GIFT—concl'd.

(2) to daughter whose husband is *khana-damad*—right of latter after daughter's death.

See *Custom (Alienation)* (6).

... .. No. 40 P. R. 1912.

(3) By way of adoption—discussed.

See *Custom (Alienation)* (8).

... .. No. 63 P. R. 1912.

(4) Of undivided share—*Mushaa*—Muhammadan Law—possession.

See *Indian Trusts Act* (1).

... .. No. 106 P. R. 1912,

GUARDIAN.

Alienation effected by *de facto* guardian of Muhammadan minor—equitable restoration of benefit derived by minor.

See *Muhammadan Law* (3).

... .. No. 33 P. R. 1912.

GUARDIAN AD LITEM.

Not a defendant, within meaning of the penal provision of order 9, rule 2, Civil Procedure Code—summons should first issue to minor defendants themselves.

See *Civil Procedure Code*, 1908 (14).

... .. No. 35 P. R. 1912.

GUARDIAN AND MINOR.

Decree passed on compromise by guardian without compliance of section 462, Civil Procedure Code, 1882—not void, but voidable by suit, if compromise was prejudicial to minor's interests.

Where a guardian *ad litem* for minor defendants had entered into a compromise and the Court, though examining the guardian as to the terms of the compromise, passed no order under section 462, Civil Procedure Code, 1882, and, in execution of the decree passed on the compromise, certain property of the minors was attached and sold—

Held, that a suit by the minors for recovery of the property sold, on the ground that the decree was bad for want of compliance with the provisions of section 462, was competent.

Sadho Missar v. Golab Singh, (1897) 3 Cal. W. N. 375, not followed.

Aman Singh v. Narain Singh, (1898) I. L. R. 20 All. 98, distinguished.

Held also, that the decree was not void *ab initio*, but voidable at the instance of the minors, if the equities so required, and the question to determine was, whether the compromise effected by the guardian was for the benefit of the minors or not.

3 P. R. 1905 (*Ghulam Ali Shah v. Shahabul Shah*), followed.

Mulkarjun v. Narhari, (1901) I. L. R. 25 Bom. 337 (P. C.), *Sheikh Ismail Rowther v. Rajab Rowther*, (1907) I. L. R. 30 Mad. 295, 37 P. R. 1895 (*Hira v. Dina*), 17 P. R. 1899 (*Bishen Singh v. Mit Singh*), and *Manohar Lal v. Jadunath Singh*, (1906) I. L. R. 28 All. 585 (P. C.) distinguished.

... .. No. 2 P. R. 1912,

GUARDIAN AND WARDS ACT.

(1) SECTIONS 34 (e), 39 (e) AND 45.

Punishment of guardian for disobeying order under section 34 (e)—removal.

Held, that section 45 of the Guardians and Wards Act makes no provisions for imposing a penalty on a guardian for disobedience to the order of the Court under section 34 (e) and, although such a guardian may be removed under section 39 (e), the imposition of a fine is *ultra vires*.

... .. No. 34 P. R. 1912

(2) SECTION 39 (h).

Removal of guardian who resided outside the jurisdiction at time of appointment—Code of Civil Procedure, 1908, section 114—review

Held, that section 39 (h) of the Guardian and Wards Act does not apply to the case of a guardian, who was residing outside the jurisdiction of the Court at the time of appointment.

Held also, that section 114 of the Code of Procedure, providing power to review, does not apply to the Guardian and Wards Act.

143 P. R. 1906 (*Farid v. Mitho*), referred to.

... .. No. 116 P. R. 1912.

GUJARS—

(1) Of Gujrat District—*khana-damad*.

See *Custom (Alienation)* (6)

... .. No. 40 P. R. 191 .

(2) Ludhiana *Tahsil*—Succession by widow in presence of a son.

See *Custom (Succession)* (14).

... .. No. 85 P. R. 1912.

(3) *Tahsil* Kharian, District Gujrat—succession to house property by daughter of uncle of last male owner.

See *Custom (Succession)* (15).

... .. No. 90 P. R. 1912.

H

HINDU LAW.

(1) *Mitakshara*—applicable in Punjab—alienation of his share in joint Hindu family by one co-parcener—maintainability of suit by other co-parceners for annulment of the alienation—Jurisdictional value of suit, to have a mortgage of half share in houses declared null and void.

Held, that the jurisdictional value of a suit to have a mortgage on half share of two houses declared null and void is the amount of the mortgage money and not the market value of the property mortgaged.

HINDU LAW—contd.

Held also, that according to the *Mitakshara* as applied in Bengal and the Punjab, one sharer has no authority without the consent of his co-sharers to dispose of his undivided share in joint Hindu family property, in order to raise money on his own account and not for the benefit of the family, and therefore if a co-parcener makes such an alienation by way of gift, mortgage, sale, etc., the other members have the right to sue for the entire annulment of the same.

Sadabart Prasad v. Foolbask Koer, (1869) 3 B. L. R. 31 (F. B.), 153 P. R. 1883 (*Banke Rai v. Madho Ram*), *Rama Nand v. Gobind Singh*, (1883) I. L. R. 5 All. 384, and *Gopal Lal v. Mahadeo Prasad*, (1902) 6 Cal. W. N. 651, referred to.

Provided that they must make good to the alienee the amount he had paid, so far as that amount has benefited them either by entering into the joint assets or from having been applied in paying of charges upon the property which would have been a *lien* upon it in his hands.

Held further, that such annulment will not affect the personal liability of the co-parcener, who made the alienation.

... .. No. 21 P. R. 1912.

(2) *Khatris* of Eminabad—joint Hindu family—agreement to partition a *haveli* in interest and right effects partition.

See *Custom (Succession)* (7).

... .. No. 38 P. R. 1912.

(3) *Adoption of second son in life-time of first adopted son—estoppel—in regard to validity of second adoption by reason of allowing second adopted son to share in inheritance from adoptive father—Indian Evidence Act, I of 1872, section 115—alienation by widow for future necessities—consent to such alienation by nearest collaterals—status of remote collateral to maintain suit for declaration under section 43, Specific Relief Act, I of 1877.*

Held, that under Hindu Law the adoption of a second son during the life-time of a first adopted son is invalid.

Held also, that the fact that the first adopted son has allowed the second adopted son to share the inheritance of the adoptive father with him does not estop the former or his representative under section 115 of the Evidence Act from denying the validity of the adoption of the latter.

Meaning of “thing” in section 115, explained.

Sarat Chunder Dey v. Gopal Chunder Laha, (1892) I. L. R. 19 I. A. 263 (P. C.), *Erangoli Vishnu v. Erangoli Krishnan*, (1883) I. L. R. 7 Mad. 3 (F. B.) and *Carr v. London and N. W. Rail. Coy.* (1875) L. R. 10 C. P. 307, referred to.

Held also, that a widow governed by Hindu Law is not empowered to sell immovable property inherited from her husband, in order that she may keep by her a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come and that the same principle applies to the need of future maintenance.

HINDU LAW—concl'd.

Ganap v. Subbi, (1903) *I. L. R.* 32 *Bom.* 577 and 11 *P. R.* 1885 (*Nihal Singh v. Mussammat Rajon*), referred to.

Held further, that when the nearest collaterals (with male issue) had given a *bona fide* consent to such an alienation by a widow, the more distant collaterals have no *status* to maintain a suit for a declaration under section 42 of the Specific Relief Act and are moreover under *Mitakshara* law bound by the consent of the former.

84 *P. R.* 1900, (*Mussammat Fateh Bibi v. Allah Bakhsh*), 7 *P. R.* 1905 (*Labhu v. Mussammat Nihali*), 97 *P. R.* 1906 (*Buta v. Khuda Bakhsh*), 37 *P. R.* 1907 (*Devi Dial v. Utam Devi*), *Raj Lukhoo Dabea v. Gokool Chunder Chowdhry*, 13 *Moo. I. A.* 228 (*P. O.*) and *Bajrangi Singh v. Manokar Nika*, (1907) *I. L. R.* 30 *All. (P. C.)*.

... .. No. 46 *P. R.* 1912.

(4) Not applicable to Kalals of *mauza* Kalal Hatti, Ambala District.

See *Custom (Alienation)* (13).

... .. No. 81 *P. R.* 1912.

(5) Adoption of sister's son valid among Banias, Delhi District.

See *Custom (Adoption)* (2).

... .. No. 88 *P. R.* 1912.

HINDU TRADE BUSINESS

Capacity of managing members to sue on contract made with them on behalf of all partners.

See *Parties*.

... .. No. 3 *P. R.* 1912.

HUNDI.

With adhesive stamp—not properly cancelled—not admissible in evidence.

See *Indian Stamp Act*.

... .. No. 18 *P. R.* 1912.

I

INDIAN ARBITRATION ACT.

SECTIONS 3 AND 19.

See *Arbitration* (1).

... .. No. 37 *P. R.* 1912.

INDIAN CONTRACT ACT.

SECTIONS 12 AND 65.

Contract by persons of unsound mind—admissibility of claim for compensation for advantage received by him.

Held, that a contract entered into by a person of unsound mind being void under section 12 of the Contract Act, section 65 of the Act does

INDIAN CONTRACT ACT—concl'd.

not apply to it and consequently plaintiffs' claim for a refund of sums advanced to the defendant (the person of unsound mind) must also fail.

Mchori Bibee v. Dharmodas Ghose, (1903) I. L. R. 30 Cal. 539 (P. C.) followed.

... .. **No. 41 P. R. 1912.**

INDIAN EVIDENCE ACT.**(1) SECTION 41.**

Meaning of judgment *in rem*.

See *Custom (Will)*.

... .. **No. 14 P. R. 1912.**

(2) SECTION 41.

Judgment *in rem*.

See *Jurisdiction (2)*.

... .. **No. 55 P. R. 1912.**

(3) Does not debar a person, who is not a party to the contract, from shewing that a transaction, ostensibly a mortgage, is in reality a sale.

See *Pre-emption (9)*.

... .. **No. 67 P. R. 1912.**

(4) SECTION 115.

Meaning of "thing" explained.

See *Hindu Law (3)*.

... .. **No. 46 P. R. 1912.**

INDIAN LIMITATION ACT, 1877.**(1) ARTICLE 118.**

Not applicable to suit for possession, although an adoption is pleaded.

See *Custom (Alienation) (16)*.

... .. **No. 126 P. R. 1912 (P. C.)**

(2) ARTICLE 144.

Suit for possession of land, sold more than twelve years before suit, by a collateral without necessity.

See *Punjab Limitation Act*.

... .. **No. 30 P. R. 1912.**

INDIAN LIMITATION ACT, 1908.**(1) SECTION 14.**

Meaning of words "defect of jurisdiction."

Plaintiff sued for pre-emption and he was directed to deposit a certain sum in advance. He failed to do so and the suit was, therefore,

INDIAN LIMITATION ACT, 1908—*contd.*

dismissed. He appealed against this dismissal and his appeal was rejected as incompetent. He then petitioned the first Court for restoration and his petition was rejected as time-barred. On appeal, the Divisional Judge held that plaintiff was entitled to a deduction, under section 14, Limitation Act, of the time he spent in prosecuting his previous appeal.

Held, that the words "defect of jurisdiction" in section 14, Limitation Act, mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie at all in any Court.

63 P. R. 1886 (*Sheoji Ram v. Shoo Chand*), 45 P. R. 1893 (*Sultan v. Ala Bakhsh*), 34 P. R. 1898 (*H. H. Raja of Faridkote v. Sardar Gurdyal Singh*) and 121 P. R. 1907 (F. B.) (*Kanahya Lal v. National Bank of India*), referred to.

... ..

No. 22 P. R. 1912.

(2) SECTION 22 AND ARTICLE 47.

Defendant made plaintiff during pendency of suit.

Held, that a person, bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure, 1898, must bring his suit for possession within 3 years from date of the final order; that the Civil Court has no jurisdiction to question the validity of the order; and that the period of 3 years cannot be extended on the ground that part of the property in suit was in possession of mortgagee.

Held also, that sub-section (2) of section 22 of the Limitation Act of 1908 makes it quite clear that sub-section (1) does not apply to cases where defendants are made plaintiffs during the pendency of a suit.

149 P. R. 1907 (*Behari Lal v. Ram Chand*), referred to.

... ..

No. 84 P. R. 1912.

(3) SECTION 32, ARTICLES 32, 120 AND 142.

Suit for ejectment of defendant from village shamilat—limitation.

Plaintiffs' suit was for ejectment of the defendant from a specific field recorded as part of a thoroughfare and *shamilat*. The suit was not for possession by establishment of plaintiffs' exclusive right to the property in suit but was nominally on behalf of the village community to remove an obstruction to the enjoyment of the *shamilat* by the proprietors generally.

Held, that section 32 of the Limitation Act had no application to the suit and that it was governed by article 120, and not by article 142.

8 P. R. 1899 (*Narain Singh v. Ishar Singh*) and 9 P. R. 1904 (*Asa Ram v. Paras Ram*) followed.

Sri Mati Sozjan Bibi v. Shamed Ali, (1892) 1 Cal. W. N. 96, *Sharoop Das Mondal v. Joggesur Roy Chaudhry*, (1899) I. L. R. 26 Cal. 564 (F. B.) and *Muhammad Amanulla Khan v. Badan Singh*, (1889) I. L. R. 17 Cal. 137 (P. C.), referred to.

... ..

No. 124 P. R. 1912.

INDIAN LIMITATION ACT, 1908—*contd.*

(4) *Articles 12 and 144—suit for possession of property sold in execution of a decree—Limitation.*

Held, that where the plaintiff in a suit for possession of property, sold in execution of a decree, was the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties and was consequently in a position to ignore the sale altogether, article 12 of the Limitation Act has no application and the suit falls under article 144.

Malkarjun v. Narahri, (1900) *I. L. R.* 25 *Bom.* 337 (*P. C.*), *Moti Lal v. Karrubuddin*, (1897) *I. L. R.* 25 *Cal.* 179 (*P. C.*), *Khiarajmal v. Daim*, (1904) *I. L. R.* 32 *Cal.* 296 (*P. C.*), *Jwala Sahai v. Masial Khan*, (1904) *I. L. R.* 25 *All.* 346, and *Kadur Hussain v. Hussain Sahib*, (1896) *I. L. R.* 20 *Mad.* 118 (*F. B.*), referred to.

... .. No. 15 P. R. 1912.

(5) ARTICLES 62, 89 AND 120.

Limitation of suit against heir of an Agent for accounts.

See *Principal and Agent*.

... .. No. 1 P. R. 1912.

(6) ARTICLE 89.

"Refusal to render accounts" must be an express refusal, not a virtual refusal to be inferred from omission or failure to fulfil a promise to render accounts.

See *Principal and Agent*.

... .. No. 1 P. R. 1912.

(7) ARTICLE 120.

Applicable—as between rival pre-emptors.

See *Punjab Pre-emption Act* (11).

... .. No. 80 P. R. 1912.

(8) ARTICLES 120, 125.

Sale of equity of redemption by a mortgagee who has sub-mortgaged his rights—whether on alienation of "land" within meaning of article 125.

Held, that the sale by a mortgagee of his equity of redemption, after having sub-mortgaged his rights, is not an alienation of "land" within the meaning of article 125, Limitation Act, and a declaratory suit by the heir of the mortgagee in respect of such sale is consequently not governed by that article but by article 120.

117 *P. R.* 1885 (*Ranjit v. Trikha*), referred to and distinguished.

... .. No. 108 P. R. 1912.

(9) ARTICLES 135 AND 144.

Mortgage by conditional sale—suit for possession as owner where foreclosure proceedings were not taken till after expiry of 12 years from date fixed for payment of mortgage money.

Held, that a mortgagee under a deed of conditional sale, who has not taken foreclosure proceedings under Regulation XVII of 1806

INDIAN LIMITATION ACT, 1908—*concl'd.*

within 12 years of the date fixed in the deed for payment of the mortgage money, is barred by limitation when suing for possession as an owner.

35 P. R. 1899 (*Moman v. Ishri Pershad*), followed.

90 P. R. 1895 (*Bhandari v. Mussammatt Jasodhan*) and 57 P. R. 1908 (*Nagar v. Sandagar*), distinguished.

... .. No. 94 P. R. 1912.

(10) ARTICLE 144.

Possession of one member of portion of joint property, which on partition fell to the share of another member, is adverse from date of partition and not from date of demand and refusal.

See *Limitation* (1).

... .. No. 6 P. R. 1912.

(11) ARTICLE 174.

Objection that decree has been satisfied out of Court.

See *Civil Procedure Code*, 1908 (15).

... .. No. 91 P. R. 1912.

(12) ARTICLE 181.

Not applicable to Petitions for Probate.

See *Probate and Administration Act* (2).

... .. No. 20 P. R. 1912.

(13) ARTICLE 182.

Step in aid of execution—application to be allowed to bid.

Where, in execution proceedings, property was put up to auction, but no one bid, and thereon decree-holder's Pleader applied for permission to his client to bid and the Court's order on this was "ordered as prayed" and the Court ordered, as re-auction was to be held within a week, that permission to bid be granted to the decree-holder and the sheriff be informed that he should re-auction on a certain date—

Held, that the application of the decree-holder was, that a step in aid be taken, the re-auction being a step in aid.

88 P. R. 1884 (*Maulvi Mohammad Shaffee v. Budri Mal*) distinguished.

... .. No. 60 P. R. 1912.

INDIAN RAILWAYS ACT.

SECTIONS 3 (4) (d), 3 (5) AND 80.

Suit for damages for loss to through-booked traffic—which Railway administration can be sued and where—jurisdiction—Civil Procedure Code, 1882, section 17, explanation III.

The plaintiff brought two suits against the defendant for damages on account of the loss sustained by him in consequence of detention

INDIAN RAILWAYS ACT—*concl'd.*

of his goods by the latter and fall in market-price of those goods during such detention and for recovery of sums unlawfully recovered from him by defendant in respect of surcharge and demurrage.

The goods consisted of consignments of gram, *mungghi* and wheat which plaintiff had delivered to the N. W. Railway at Ludhiana for carriage to Bairab in Eastern Bengal.

The lines of various Railway Companies were used and the goods conveyed to Goalundo by the Eastern Bengal State Railway and thence to Bairab by *boat* by the defendant-company, whose head office is in Calcutta.

Held, that having regard to the definitions of "railway" in section 3 (4) (d) of the Railway Act and of "Railway administration" in section 3 (5), the defendant-company was a Railway administration on whose railway the loss complained of occurred within the meaning of section 80 and plaintiff under that section had the option of suing either the North-Western Railway or the defendant-company.

Held also, that the words "loss, destruction or deterioration" of goods in section 80 cover a loss by fall in market-price

6 P. R. 1897 (*Changa Mal v. Bengal N.-W. Railway Co.*), referred to.

Held further, that under section 17, explanation III of the Civil Procedure Code, 1882, the suit could be filed where the contract was made, *i.e.*, at Ludhiana.

... ..

No. 111 P. R. 1912.

INDIAN REGISTRATION ACT, 1877.

(1) SECTION 17.

Whether usual widow's estate amounts to a "right, title or interest in land."

Held, that among agricultural tribes in the Punjab the right of a widow of a proprietor to hold her deceased husband's land amounts to a "right, title or interest in the land" within the meaning of section 17 of the Registration Act and consequently an agreement relinquishing that right, where the value of it exceeds Rs. 100, requires registration.

Nilava Kom Rachappa v. Rudraya Bin Rachappa, (1875) 12 Bom. H. C. R. 141 and *Kalpagathachi v. Ganapathi Pillai*, (1880) I. L. R. 3 Mad. 184.

... ..

No. 92 P. R. 1912.

(2) SECTION 47.

Day from which registered deed of sale "operates" where consideration has not been paid.

Held that, in the absence of a specific contract to the contrary, the failure to pay consideration on a sale of immovable property does not prevent the registration antedating to the date of the execution of the deed under section 47 of Registration Act.

INDIAN REGISTRATION ACT, 1877—*concl'd.*

132 P. R. 1879 (*Abbas Ali Shah v. Pir Buksh*), 91 P. R. 1902 (*Gharib Khan v. Sikandar*), and *Motichand Jivraj v. Sagun Jethiram*, (1904) I. L. R. 29 Bom. 46, referred to and followed.

Lakshman Das Sarup Chand v. Basrat, (1881) I. L. R. 6 Bom. 168, 93, P. R. 1883 (*Bhagat Singh v. Ram Narain*), and 55 P. R. 1911 (*Mussammat Bhagan v. Allah Ditta*), distinguished.

... ..

No. 105 P. R. 1912.

INDIAN STAMP ACT, II OF 1899.

Sections 12 and 35—Admissibility in evidence of hundi bearing adhesive stamps not properly cancelled—proof of debt apart from the hundi.

Held, that a *hundi* bearing adhesive stamps not properly cancelled at the time of execution, is not admissible in evidence (*vide* sections 12 and 35 of the Stamp Act).

Virbhadrappa v. Bhimaji Balaji, (1904) I. L. R. 28 Bom. 432, referred to.

Held also, that under the circumstances of the case the lower Courts were wrong in refusing to take evidence apart from the *hundi* as to the existence of the debt.

66 P. R. 1906 (*Ganga Ram v. Amir Chand*), *Parsotam Narain v. Taley Singh*, (1903) I. L. R. 26 All. 178, *Virbhadrappa v. Bhimaji Balaji*, (1904) I. L. R. 28 Bom. 432 and *Bunarsi Parshad v. Fazl Ahmad*, (1905) I. L. R. 28 All. 298, referred to.

... ..

No. 18 P. R. 1912.

INDIAN TRUSTS ACT, II 1882.

(1) SECTIONS 1 AND 5.

Creation of wakf without written instrument—Muhammadan Law—gift of undivided shares in immovable property—Mushaa—declaration by donor that possession has been given to donees.

Held, that the provisions of section 5 of the Indian Trusts Act do not apply to *wakf* (*vide* section 1) and that a written instrument is, therefore, not obligatory for the creation of a *wakf*.

Held also, that a gift is not invalid under Muhammadan Law, merely because there was no formal acceptance of it by the donee at the time of the execution or registration of the deed.

Held also, that whether a gift of undivided property is valid or not under Muhammadan Law, possession given and taken under such a gift effectually transfers the property.

Held further, that a declaration by the donor in the deed of gift that possession has been given to the donee is binding on the donor's heir and all persons claiming through him.

Held, consequently, that a gift by a father by registered deed in favour of his sons, grandson and wives of certain land, houses and shops, of which the father was in joint possession with the donees, and of which he subsequently gave entire possession to the donees was valid and in accordance with Muhammadan Law.

INDIAN TRUST ACT—concl'd.

Humera Bibi v. Najm-un-Nissa Bibi, (1905) I. L. R. 28. All. 147
57 P. R. 1882 (*Tara v. Jodha*), *Muhammad Mumtaz Ahmad v.*
Zubaida Jan, (1889) I. L. R. 11 All. 460 (P. C.) and 91 P. R. 1894
(*Mussammat Murad Khatun v. Ahmad Ali*), referred to.

... .. No. 106 P. R. 1912.

(2) SECTION 63.

*Following trust property into hands of any one, in whose hands it can
be identified.*

One L. D. made over his property to two trustees for liquidation of
his debts. The trustees executed several promissory notes in favour of
creditors. The original trustees were subsequently released by the
Court and two new trustees appointed. L. D. having meanwhile died,
his son S.N. sued the new trustees for possession of the trust property,
and the suit was compromised on an understanding that the property
had been restored to plaintiff. The restoration had, however, been in-
complete. The holders of the promissory notes now sued S.N. and the
new trustees for recovery of their money.

Held, that under section 63, Indian Trusts Act, the trust property
could be followed into the hands of S. N. and he should accordingly be
made liable for the decree jointly with the trustees to the extent of the
trust property in his possession.

... .. No. 101 P. R. 1912.

INSOLVENCY COURT.

Jurisdiction of—in respect of property outside its Province.

See Jurisdiction (2).

... .. No. 55 P. R. 1912.

INTEREST.

Delay in suing, no reason for reducing interest on a mortgage

See Joint Mortgage.

... .. No. 50 P. R. 1912.

INTERPRETATION OF STATUTES.

See Punjab Courts (Amendment) Act, I of 1912.

... .. No. 122 P. R. 1912

J

JOINT FAMILY BUSINESS.

*Competency of managing members to sue in respect of contract
made with them on behalf of all partners.*

See Parties.

... .. No. 3 P. R. 1912

JOINT FAMILY PROPERTY.

Possession of one member of family of a portion of the joint property, which by partition fell to share of another member, is adverse from date of partition.

See *Limitation* (1).

... ..

No. 6 P. R. 1912.

JOINT HINDU FAMILY.

(1) Alienation of his share in joint property by one co-parcener—power of other members to have it set aside.

See *Hindu Law* (1).

... ..

No. 21 P. R. 1912.

(2) Agreement to partition a *hareli* in interest, effects partition.

See *Custom (Succession)* (7).

... ..

No. 38 P. R. 1912.

JOINT MORTGAGE.

Legality of releasing share of one of the joint mortgagors—delay in suing, no reason for reducing interest—suit by mortgagee against mortgagors for possession of remaining half of land mortgaged—jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, XIV of 1887, section 77 (3) (e).

The plaintiff held a mortgage of a joint holding by two brothers (defendants) and sued them nearly 12 years after date of mortgage for possession of half the holding in lieu of half the mortgage money and interest thereon at 12 annas per cent. per mensem, he having previously allowed defendant 2 to redeem his half share.

The mortgage was with possession, the land being cultivated by certain occupancy and non-occupancy tenants and the deed stipulated that the mortgagors would assist the mortgagees in recovering the share of produce from the tenants and would make it over to the mortgagees, who would first pay themselves out of it the interest due and amount of Government demand and credit the balance, if any, to the mortgagors against the principal.

Held, that the delay in suing was no sufficient reason for refusing plaintiffs the full interest contracted in the mortgage deed.

Held also, that the settlement with defendant 2 for his share of the joint mortgage was lawful, although defendant 1 might have his remedy against defendant 2 by separate suit, if the latter's absolution gave rise to any equities in favour of the former.

Held further, that the suit was not one by a landlord to eject a tenant and was cognizable by a Civil Court.

46 P. R. 1894 (F. B.) (*Buta Shah v. Kalu*), distinguished

... ..

No. 50 P. R. 1912

JURISDICTION.

(1) *Power of Appellate Court to pass any decree necessary for the decision of an appeal, which it has jurisdiction to entertain—Punjab Courts Act, XVIII of 1884, section 39.*

Plaintiffs sued for possession by redemption of certain land on payment of Rs. 400; defendant pleaded that more mortgage money was due to him besides large sums spent upon improvements. The first Court gave a decree for redemption on payment of Rs. 3,770,

JURISDICTION—contd.

defendant appealed to the Divisional Court claiming that the amount should have been Rs. 22,000. The Divisional Judge increased the amount payable by the plaintiffs to Rs. 14,258; plaintiffs appealed to the Chief Court.

Held, that the first Court's decree being for possession on payment of an amount less than Rs. 5,000, the Divisional Judge had jurisdiction to entertain the appeal, and could consequently pass any decree necessary for its decision, his powers not being limited in this respect.

106 P. R. 1895 (F. B.) (*Muhammad Khan v. Ashak Muhammad Khan*), followed.

98 P. R. 1886 (*Jiwan Singh v. Santok Singh*), 44 P. R. 1888 (*Mussammatt Rajo v. Dasu*), 169 P. R. 1888 (*Bhag Mal v. Mohra*), 91 P. R. 1889 (*Ranje Khan v. Bir Bal*), 63 P. R. 1891 (*Hazara Singh v. Lal Singh*), 40 P. R. 1892 (*Sardar Kirpal Singh v. Nawab Khan*), 101 P. R. 1900 (*Imam Din v. Ghulam Muhammad*), 58 P. R. 1902 (*Maman Lal v. Abdul Aziz*), 24 P. R. 1903 (F. B.) (*Ghulam Ghaus v. Nabi Bakhsh*), 46 P. R. 1906 (*Manna Lal v. Samandu*), 16 P. R. 1908 (F. B.) (*Muhammad Afzal Khan v. Nand Lal*), 19 P. R. 1908 (F. B.) (*Abdur Rahman v. Charagh Din*), 46 P. R. 1908 (*Fata v. Khan Bahadur*), Nilmony Singh v. Jagabandhu, (1896) I. L. R. 23 Cal. 536, and *Rajlakshmi Dasee v. Katayajuni Dasee*, (1910) I. L. R. 38 Cal. 639, referred to.

... .. No. 54 P. R. 1912.

(2) Of Insolvency Court.

Order of Insolvency Court—how far binding, in regard to rights in immovable property situate in another Province—objector's submission to jurisdiction—Judgment in rem—Indian Evidence Act, section 41—Civil Procedure Code, section 16 (c).

Held, that a creditor who has unsuccessfully opposed his debtor's application in the Bombay High Court to be declared an insolvent, on the ground, *inter alia*, that he had made fraudulent transfers of property, is bound by the decision of that Court and cannot in a subsequent suit filed in the Punjab raise the plea that the transfer of the property was fraudulent and void, notwithstanding that the property concerned is situate in that Province.

The British South Africa Company and the Companhia De Mocambique (1893) I. R. App. Cas. p. 602, 122 P. R. 1908 (*Hari Ram v. Kanshi Ram*), *Sardarmal Jagannath v. Aranvayal Sahhapathy*, (1896) I. L. R. 21 Bom. 205, *Ganesh Das Pana Lal v. R. D. Sethna*, (1908) I. L. R. 32 Bom. 198, *In re Rassul Haji Cassum*, (1910) 13 Bom. I. R. 13, *Edward Caston v. L. H. Caston*, (1899) I. L. R. 22 All. 270, 45 P. R. 1910 (P. C.) (*The Official Assignee, Bombay, v. The Registrar, Small Cause Court, Amritsar*), referred to.

... .. No. 55 P. R. 1912

Evidence taken before a Munsiff in suit for dissolution of partnership, who subsequently finds that he has not jurisdiction to try the case, whether admissible in Court of competent jurisdiction.

Held, that where in a suit for dissolution of partnership, the Munsiff trying the case, after issuing a commission to examine the account

JURISDICTION—*concl.*

books, finds that the value of the suit exceeds his jurisdiction, the proceedings before him are *coram non judice* so far as the eventual decision of the question of the indebtedness of one party to the other is concerned, and that the Sub-Judge, before whom the case came subsequently, was justified in declining to receive the report of the Commissioner as evidence in his Court.

Prabhakarbhat v. Vishwamthar Paudit, (1884) *I. L. R.* 8 *Bom.* 313, (317, 318 (*F. B.*) and *Kalian Dayal v. Kalian Narer*, (1884) *I. L. R.* 9 *Bom.* 259 (265), followed.

... .. No. 96 P. R. 1912.

(4) In regard to suit for damages against a Railway Company in Bengal on account of delay in delivery of goods—suit filed at Ludhiana.

See *Indian Railways Act*

... .. No. 111 P. R. 1912.

JURISDICTION (CIVIL COURT).

To hear suit for possession by mortgagee under mortgage by conditional sale after expiry of year of grace.

See *Punjab Alienation of Land Act* (2).

... .. No. 31 P. R. 1912.

JURISDICTION (CIVIL OR REVENUE COURT).

(1) *Suit by landlord to dispossess a mortgagee of an occupancy holding on the death of the occupancy tenant—Punjab Tenancy Act, XVI of 1887, section 77 (3) (h).*

Held, that a suit by a landlord to dispossess a mortgagee of an occupancy holding, which had ceased to exist owing to the death of the occupancy tenant, falls within the terms of section 77 (3) (h) of the Punjab Tenancy Act, and is consequently cognisable by a Revenue Court.

9 *P. R.* 1910 (*Qaidu v. Buland Khan*), overruled.

88 *P. R.* 1894 (*Gurdial v. Farida*), referred to.

... .. No. 32 P. R. 1912.

(2) Suit by mortgagee against mortgagor for possession—landlord and tenant.

See *Joint mortgage*.

... .. No. 50 P. R. 1912.

(3) Suit for declaration in respect of right to collect village dues.

See *Punjab Tenancy Act* (8).

... .. No. 110 P. R. 1912.

(4) *Suit for a share in dharat collected by defendants—small cause.*

Held, that a suit for plaintiffs' share in *dharat* collected by the defendants is cognisable by a Civil Court.

28 *P. R.* 1894 (*Buta v. Fauja Singh*), followed.

JURISDICTION (CIVIL OR REVENUE COURT)—*concl'd.*

Held also, that such a suit is a small cause.

81 P. R. 1889 (*Harnam v. Ganda*) and 204 P. R. 1889 (*Hayat Shah v. Jawaya*), referred to.

29 P. R. 1889 (*Ram Singh v. Sikandar*), distinguished.

... .. No. 120 P. R. 1912.

K

KALALS.

Mauza Kalal Hatti, Ambala District, governed by custom.

See *Custom (Alienation)* (13).

... .. No. 81 P. R. 1912.

KASSARS.

Mauza Mangalwal, *tahsil* Chakwal, Jhelum District—will in favour of sister.

See *Custom (Alienation)* (14).

... .. No. 98 P. R. 1912.

KHATRIS.

Of Eminabad—governed by Hindu Law.

See *Custom (Succession)* (7).

... .. No. 38 P. R. 1912.

KHATTARS.

Fatehjang Tahsil—succession of widows and unmarried daughters in presence of sons—maintenance—amount of.

See *Custom (Succession)* (16).

... .. No. 112 P. R. 1912.

L

LAND.

Meaning of—in article 125, Limitation Act—does not include equity of redemption of mortgagee who has sub-mortgaged.

See *Indian Limitation Act*, 1908 (8).

... .. No. 108 P. R. 1912.

LAND ACQUISITION CASES.

Full Pleader's fee allowed in appeal, if claim is exorbitant.

See *Pleader's fee*.

... .. No. 107 P. R. 1912.

LANDLORD AND TENANT.

Land let for building sites in Kishenganj, Delhi—permanent tenures at fixed rent—whether landlord can claim ejectment of tenant or enhancement of rent, or object to rebuilding.

Plaintiffs as ground landlords of a part of the suburbs of Delhi known as Kishenganj sued defendants in three separate suits for ejectment, and, in case ejectment was not granted, plaintiffs prayed in two of the suits for enhancement of rent and in the third suit for an injunction restraining the defendants from rebuilding.

It appeared that the land was let in or about the year 1859 for building sites at a ground rent of 8 annas per 100 square yards, that the lessees built houses upon the land, and that they or their successors in title had been in occupation ever since at the rent originally fixed.

Held, that the tenancies were of a permanent character at a fixed rate of rent and that the claim for ejectment or enhancement must therefore be disallowed.

Held also, that the plaintiffs had no right to prevent the defendants from reconstructing their houses.

Caspersz v. Kader Nath Sarbadhikari, (1901) *I. L. R.* 28 *Cal.* 738, referred to.

Prosunno Coorance Deba v. Sheikh Rutton Bepary, (1878 *I. L. R.* 3 *Cal.* 696, *Secretary of State for India v. Luchmeswar Singh*, (1888) *I. L. R.* 16 *Cal.* 223 and *Beni Ram v. Kundan Lal* (1899) *I. L. R.* 21 *All.* 496 (*P. C.*), distinguished.

... .. No. 121 P. R. 1912.

LEASE.

Permanent—for building purposes at Delhi—power of landlord to eject or enhance rent.

See *Landlord and Tenant*.

... .. No. 121 P. R. 1912.

LIMITATION.

(1) *Suit for recovery of a share in joint Hindu family property after partition—adverse possession—Indian Limitation Act, article 144.*

Held, that a plaintiff must be able to show that on his own allegations his suit is within time and cannot be allowed to adopt this or that useful allegation of the defendant in order to save limitation.

Held also, that where the plaintiff's allegation is, that the property of a joint Hindu family has been partitioned on a certain date, one member remaining actually in possession of the whole—the possession of the latter would be adverse to the other member or any one claiming under him from the date of partition and not from date of demand and refusal of share, and that the fact that the latter died shortly after partition and left a widow does not take the case out of the operation of article 144 of the Limitation Act.

Runjeet Ram Panday v. Goburdhan Ram Panday, (1873) 20 *W. R.* 25 (*P. C.*), and *Ranalakshmana v. Ramanna*, (1886) *I. L. R.* 9 *Mad.* 482 (*P. C.*) referred to.

... .. No. 6 P. R. 1912.

LIMITATION—concl'd.

(2) As between rival pre-emptors.

See *Punjab Pre-emption Act* (11).

... .. No. 80 P. R. 1912.

(3) *Pre-emption suit—in respect of sale, requiring sanction of Deputy Commissioner—starting point of limitation—Punjab Alienation of Land Act, XIII of 1900, sections 3 and 14—Punjab Pre-emption Act, sections 21 (2) and 26.*

Held, that for the purposes of a pre-emption suit, in respect of a sale, which requires the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act, limitation starts from the date on which sanction is given and not from the date of mutation.

... .. No. 82 P. R. 1912.

(4) For suit of ejectment of defendant from village *shamilat*.

See *Indian Limitation Act*, 1908 (3).

... .. No. 124 P. R. 1912.

(5) In suits for possession, when adoption is set up.

See *Custom (Alienation)* (16).

... .. No. 126 P. R. 1912 (P.C.).

LIMITATION ACT.

See *Indian Limitation Act* and *Punjab Limitation Act*.

M

MAINTENANCE.

For widow and daughter—amount of—

See *Custom (Succession)* (16).

... .. No. 112 P. R. 1912.

MAXIMS.

Expressio unius est exclusio alterius.

See *Punjab Courts (Amendment) Act*.

... .. No. 122 P. R. 1912.

MINOR.

(1) Suit by—to set aside a decree passed on compromise by guardian without compliance of section 462, Civil Procedure Code, 1882.

See *Guardian and Minor*.

... .. No. 2 P. R. 1912.

(2) Suit by—to set aside alienation not for his benefit.

See *Muhammadan Law* (2).

... .. No. 17 P. R. 1912.

MINOR—*concl'd.*

(3) Defendants in a suit—summons should in first place be issued against minors themselves, and not against a proposed guardian.

See *Civil Procedure Code*, 1908 (14).

... .. No. 35 P. R. 1912.

(4) Application to submit to arbitration by guardian or next friend of—requires express sanction of Court.

See *Civil Procedure Code*, 1908 (21).

... .. No. 95 P. R. 1912.

MINOR AND GUARDIAN.

Alienation by *de facto* guardian of Muhammadan minor—suit by alienee for possession—equitable restoration of benefit obtained by minor.

See *Muhammadan Law* (3).

... .. No. 33 P. R. 1912.

MITAKSHARA.

Applicable in Punjab.

See *Hindu Law* (1).

... .. No. 21 P. R. 1912.

MORTGAGE.

(1) On occupancy holding, which is subsequently sold to landlord.

See *Punjab Tenancy Act* (2).

... .. No. 23 P. R. 1912.

(2) By conditional sale—complete after expiry of year of grace—reference to Deputy Commissioner under section 9 (2) of Punjab Act XIII of 1900 no longer called for.

See *Punjab Alienation of Land Act* (2).

... .. No. 31 P. R. 1912.

(3) Legality of releasing one of the joint mortgagors.

See *Joint Mortgage*.

... .. No. 50 P. R. 1912.

(4) By way of conditional sale—foreclosure proceedings—reference to Deputy Commissioner under Act XIII of 1900.

See *Punjab Alienation of Land Act* (3).

... .. No. 59 P. R. 1912.

(5) Where mortgagee is to redeem a previous mortgage, it must be done within a reasonable time—demand by mortgagor not necessary—acquiescence by mortgagor in delay.

In 1893 defendant mortgaged to plaintiff certain land, a portion of which was in possession of a previous mortgagee—part of the mortgage-money was retained by plaintiff-mortgagee to pay off the previous

MORTGAGE—concl'd.

mortgagee. The land mortgaged was to remain in possession of defendant mortgagor and he was also to get possession of the land previously mortgaged after it had been redeemed. The mortgagor was to pay interest annually, and in default of payment the mortgagee was entitled to possession.

In 1907 plaintiff-mortgagee sued for possession alleging that defendant had failed to pay interest since 1904, in which year the plaintiff had redeemed the previous mortgage; defendant alleged that he had paid interest up to year of suit (which, however, he failed to prove).

Held, that under the correct construction of the Full Bench ruling, 59 P. R. 1907 (*Gokal Chand v. Rahman*), the mortgage would have become extinct and unenforceable on account of the plaintiff's failure to redeem the previous mortgage within a "reasonable time" from the date of mortgage, even without any demand by the mortgagor, had not the latter acquiesced in the continued possession of the previous mortgagee by paying the interest regularly to the plaintiff up to 1904. The delay in redeeming the previous mortgage was apparently not considered unreasonable by the defendant-mortgagor, whose wishes and interests were an important factor in the matter.

Held also, that the plaintiff was entitled to a decree for possession *simpliciter*, the matter of the amount of the lien being left to be decided on redemption.

... .. **No. 63 P. R. 1912**

(6) By conditional sale—Suit for possession as owner, where foreclosure proceedings were not taken till after expiry of 12 years from date fixed for payment of mortgage-money—limitation.

See *Indian Limitation Act*, 1908 (9).

... .. **No. 94 P. R. 1912.**

MUHAMMADAN LAW.

(1) Validity of will, among Pathan agriculturists, Ferozepore, judged by Muhammadan Law and not by custom.

See *Custom (Will)*.

... .. **No. 14 P. R. 1912.**

(2) *Muhammadan Law*—mortgage by one adult son (having several minor brothers and sisters) of ancestral house in order to raise funds for one sister's marriage—suit by minor brothers for possession in disregard of the mortgage—benefit of minors—reasonableness of amount spent on the marriage—estoppel.

Held, that among Muhammadans of the Lahore city, bound by Muhammadan Law, a mortgage of ancestral house property made by the only adult son, in order to raise a loan for the marriage expenses of a sister, is not for the benefit of the latter's minor brothers and therefore not binding on them.

Hurbai v. Hiraji B. Shanja, (1895) *I. L. R.* 20 *Bom.* 116, referred to.

Held also, that a brother is not justified in expending about half the patrimony of himself and his three brothers upon the *doli* ceremonies of one of his sisters.

MUHAMMADAN LAW—*concl'd.*

Held further, that defendant-mortgagee in a suit by the minor sons for possession of the mortgaged property, in disregard of the mortgage, was not estopped from asserting that the widow and daughters were entitled to share in the property.

... .. No. 17 P. R. 1912.

(3) *Alienation of minor's immovable property by de facto guardian—suit by alienee against minor in possession—equitable restoration of benefit obtained by minor.*

Where the immovable property of a Muhammadan minor has been alienated by a *de facto* guardian, who is not a *near* guardian under Muhammadan Law, and the alienee sues the minor (after attaining majority), he being in possession of the property—

Held, that not only the claim for possession, but also the alternative prayer for equitable restoration of benefit received by the minor from the alienation, must fail, as this can only be enforced against a minor or *quondam* minor, if he is himself plaintiff in the case.

144 P. R. 1883 (*Anant Ram v. Nazir Hussain*), 58 P. R. 1891 (*Dharm Singh v. Sayad Zahur ul-Hussain*), 52 P. R. 1904 (*Allah Dad v. Budha*) and 91 P. R. 1907 (*Nur Muhammad v. Ainna*), referred to.

... .. No. 33 P. R. 1912.

(4) *Quraishi Sheikhs of gasba Thoru, Gurgaon district not governed by.*

See *Custom (Alienation)* (12).

... .. No. 79 P. R. 1912.

(5) *Creation of waqf—necessity of written deed—gift of undivided share—possession.*

See *Indian Trusts Act* (1).

... .. No. 106 P. R. 1912.

(6) *Sheikhs, Delhi City—governed by—in matters of succession.*

See *Custom (Succession)* (17).

... .. No. 113 P. R. 1912.

(7) *Does not recognise adoption, nor right of inheritance to adopted son.*

See *Custom (Alienation)* (16).

... .. No. 126 P. R. 1912 (P. O).

MUSHAA.

Gift of undivided share—Muhammadan Law—possession.

See *Indian Trusts Act* (1).

... .. No. 106 P. R. 1912.

N

NECESSITY.

Alienation for future necessities by Hindu widow.

See *Hindu Law* (3).

... .. No. 46 P. R. 1912.

O

OCCUPANCY HOLDING.

Succession to—by adopted son.

See *Custom (Adoption)* (2).

... .. No. 88 P. R. 1912.

P

PARTIES.

Capacity of managing members of Hindu trade business to sue on behalf of the business—limitation—where other member (not a necessary party) was not properly brought on record till after expiry of limitation.

Held, following Kishen Parshad v. Har Narain Singh, (1910) 15 Cal. W. N. 321 (P. C.), that it is not necessary for all the partners in a Hindu trade business to join in a suit, and that it is sufficient if the managing members, with whom the contract was made, sue to recover damages or compensation for breach of such contract, and that the fact that one of the plaintiffs, the widow of one of the deceased partners (first wrongly described as a minor) was not properly brought on the record until after expiry of the period of limitation, could not affect the rights of the managing brothers to sue, and the suit was not barred on that account.

... .. No. 3 P. R. 1912.

PATHANS.

Of Miani—Hosbiarpur district.

See *Custom (Alienation)* (7).

... .. No. 47 P. R. 1912.

PLAINTIFF.

Foreign Company can sue through agent or principal officer.

See *Civil Procedure Code*, 1908 (13).

... .. No. 8 P. R. 1912.

PLEADER'S FEE.

In appeals in land acquisition cases—where claim in appeal is exorbitant.

Held, that where the claim made in a land acquisition appeal is exorbitant and speculative, there is no reason for not allowing as counsel's fee the usual ad valorem fee on the amount in appeal.

... .. No. 107 P. R. 1912.

PRE-EMPTION.

(1) *Suit by grandson of vendor, sale having been assented to by his father—Punjab Pre-emption Act, II of 1905, section 12—assent by de facto guardian—presence at sale—waiver—benami pre-emptor.*

Plaintiff sued to pre-empt land sold by his grandfather, his father having assented to the sale.

PRE-EMPTION—*contd.*

Held, that under section 12, Punjab Pre-emption Act, 1905, each heir has an independent right of pre-emption in order of succession, and that consequently the plaintiff's right, being independent of his father's, was not affected by his father's assent to the sale.

Held also, that even if plaintiff was a minor at the time of sale, the father's assent to the sale would not bind the son, there being nothing to show that the former acted or professed to act on behalf of his son as his *de facto* guardian.

26 P. R. 1911 (pp. 75, 76) (*Sundar v. Salig Ram*) and 121 P. R. 1889 (*Kadir Bakhsh v. Mussammatt Nur Bibi*), referred to.

Held also, that the mere presence of plaintiff at the time when the bargain was struck does not prove acquiescence in the sale.

Held further, that the Courts are not concerned with the questions, where the pre-emptor is raising the money and what he is going to do with the land.

139 P. R. 1894 (*Brij Nath v. Jita*) and 19 P. R. 1898 (*Ramsukh Das v. Fazal-ul-din*), referred to.

... .. No. 7 P. R. 1912.

(2) in town of Urmur.

See *Custom (Pre-emption)* (1).

... .. No. 28 P. R. 1912.

(3) in regard to building site close to a town—but still used for agricultural purposes.

See *Punjab Pre-emption Act* (2).

... .. No. 26 P. R. 1912.

(4) On sale of occupancy holding (under section 6, Punjab Tenancy Act)—*suit* by joint tenant—rights of landlord—*Punjab Pre-emption Act, II of 1905, sections 2 (2) and 12—Punjab Tenancy Act, XVI of 1887, sections 53, 56 and 60.*

Held, that the sale to a landlord of occupancy rights (under section 6 of the Tenancy Act) is liable to pre-emption.

16 P. R. 1905 (*Ganhra v. Har Bhaj*), distinguished.

... .. No. 33 P. R. 1912.

(5) *In respect of land sold subject to mortgage—mortgage-money left with vendee to effect redemption—if vendee has accordingly paid off the mortgage before suit, pre-emptor cannot claim to pre-empt only in respect of the equity of redemption.*

Where a sale of land, subject to a mortgage with possession, was effected for Rs. 3,500 and of the purchase-money Rs. 2,000 was left with the vendees to pay off the mortgage, and the vendees accordingly redeemed the mortgage and took possession—

Held, that a person who, after such redemption, sues for pre-emption in respect of that sale cannot claim to get a decree only for the equity of redemption on payment of Rs. 1,500 but that he is bound to

PRE-EMPTION—*contd.*

recognise the redemption of the mortgage as a valid act of the vendees under the contract of sale and to restore them to the position they occupied before the sale; and that consequently the lower Appellate Court was right in directing the pre-emptor to pay the vendees Rs. 3,500 as a condition precedent to obtaining possession of the land.

93 P. R. 1902 (F. B.) (*Bogha Singh v. Gurmukh Singh*), differentiated.

... .. No. 43 P. R. 1912.

(6) *Acquiescence in sale by pre-emptor—waiver.*

Where two plaintiffs-pre-emptors were found to have been present and helped in the sale negotiations and one of them assisted in demarcating the land sold out of a large field and thus by their conduct actively induced in the vendee's mind the belief that they were perfectly agreeable to the purchase by the vendees and did not intend to enforce their rights—

Held, that the conduct of the plaintiffs amounted to waiver and that their suit must accordingly be rejected.

7 P. R. 1876 (*Rullia Mal v. Dulo Mal*) and *Bhairon Singh v. Lalman*, (1884) I. L. R. 7 All. 23, referred to.

37 P. R. 1908 (*Fazal Dad Khan v. Sawan Singh*), 99 P. R. 1910 (*Roshan Din v. Khuda Bakhsh*), 100 P. R. 1885 (*Shah Boikraj v. Sundar Singh*), 78 P. R. 1881 (*Mula v. Nihal Chand*), and 185 P. L. R. 1905 (*Ram Kishen v. Fakir Ali Shah*), distinguished.

... .. No. 43 P. R. 1912.

(7) Custom—exists in town of Dasuha, Hoshiarpur district.

See *Custom (Pre-emption)* (2).

... .. No. 61 P. R. 1912.

(8) Custom—exists in *Kucha Nihal Singh, Mohulla Multani Darwaza*, Ferozepore City.

See *Custom (Pre-emption)* (3).

... .. No. 62 P. R. 1912.

(9) *Mortgage—Pre-emptor not debarred from shewing that it is a sale—Indian Evidence Act, I of 1872, section 92—Punjab Pre-emption Act, II of 1905, section 4—effect of sale by pre-emptor (after obtaining decree but before decision on final appeal) of the property in respect of which his right arose.*

Plaintiff sued for pre-emption in respect of an alienation of a building site in Chiniot, which purported to be a mortgage with possession for 15 years, but which, plaintiff alleged, was in reality a sale. Under the terms of the deed, the mortgagee, a nephew of the mortgagor, was to be at liberty to construct buildings—the cost of which was to form an additional charge on the mortgaged property and the amount was to be repaid on redemption together with interest at Rs. 6 per cent. per annum. No interest was chargeable on the mortgage money (Rs. 1,900), the mortgagee taking the income of the mortgaged property in lieu thereof.

PRE-EMPTION—*conclld.*

Held, that plaintiff, not being a party to the deed, was not debarred under section 92, Indian Evidence Act, from shewing that the transaction was in reality a sale and not a mortgage, and that section 4 of the Punjab Pre-emption Act expressly allowed him to do so.

117 P. R. 1890 (F. B.) (*Tara Chand v. Baldeo*), and 20 P. R. 1899 (*Parma Nand v. Airapat Ram*), referred to.

Held also, that the fact that the pre-emptor had, after the lower Appellate Court had confirmed the decree passed in his favour by the first Court, sold the property in respect of which his right of pre-emption arose did not entitle the other side to have the decree set aside in further appeal to the Chief Court, on the ground that the pre-emptor had lost all rights to pre-emption before the case was finally decided.

91 P. R. 1909 (F. B.) (*Dhanna Singh v. Gurbakhsh Singh*), referred to.

Held further, that plaintiff, on whom the *onus* rested, had failed to prove that the transfer was a sale and not a mortgage.

100 P. R. 1895 (F. B.) (*Jagdish v. Man Singh*), 78 P. R. 1904 (*Muhammad Umar v. Kirpal Singh*), 19 P. R. 1905 (*Bishen Singh v. Mussamat Paro*), 145 P. R. 1906 (*Anwar Hassan v. Umritul Karim*), and 20 P. R. 1899 (*Parma Nand v. Airapat Ram*), referred to.

... .. No. 67 P. R. 1912.

(10) *In respect of sale of agricultural land—decreed by first Court on payment of Rs. 7,000—Valuation of suit for purposes of appeal—Punjab Courts Act, XVIII of 1884, section 39—withdrawal of money paid into Lower Court by pre-emptor, no bar to appeal by vendee.*

Plaintiff sued for pre-emption in respect of a sale of agricultural land, thirty times the revenue of which amounted to Rs. 1,132. The first Court decreed the claim on payment of the full price, Rs. 7,000.

Held, that notwithstanding the decree so passed, the value of the suit for purposes of jurisdiction, so far as section 39 of the Punjab Courts Act is concerned, remained throughout Rs. 1,132 and that consequently the appeal from the decree of the first Court lay to the Divisional Court and not to the Chief Court.

16 P. R. 1908 (F. B.) (*Muhammad Afzal Khan v. Nand Lal*), 58 P. R. 1902 (*Maman Mal v. Abdul Aziz*), and *Ibrahimji Issaji v. Bejanji, Jamsedji* (1895) I. L. R. 20 Bom. 265, referred to and distinguished.

Held also, that the fact that the vendee had withdrawn the money paid into the lower Appellate Court under its decree by the pre-emptor, did not debar the vendee from appealing against that decree.

16 P. R. 1907 (*Sundar Das v. Dhanpat Rai*), followed.

... .. No. 83 P. R. 1912.

See also CUSTOM (PRE-EMPTION).

PRE-EMPTOR.

Withdrawal of deposit made under section 19, Act II of 1905, by—no bar to appeal.

See *Punjab Pre-emption Act* (8).

... .. **No. 58 P. R. 1912.**

PRINCIPAL AND AGENT.

Suit against agent for account—suit against heir of deceased agent—limitation—Indian Limitation Act, IX of 1908, Schedule II, articles 62, 89 and 120.

Held, that the refusal of an agent to render accounts mentioned in article 89, Limitation Act, must be an express refusal on a definite date and not merely a virtual refusal to be inferred from the omission or failure on his part to fulfil a promise made by him to render the account to the principal, in answer to a demand by the latter.

Hari Narain Ghose v. Administrator-General, (1878) 3 Cal. L. R. 416, dissented from; *Easin Sarkar v. Barada Kishore*, (1909) 11 Cal. L. J. 43, differentiated.

Held also, that neither article 62 nor article 89 is applicable to a suit against the heir of a deceased agent for rendition of accounts and payment of the amount proved due out of the deceased's estate, but that such a suit is governed by article 120 and limitation begins to run from the date of the agent's death.

96 P. R. 1886 (*Seth Chand Mal v. Kalian Mal*), *Gurulas Pynes v. Ram Narain Sahu*, (1884) I. L. R. 10 Cal. 860, and *Ras Girraj Singh v. Ram Raghubir*, (1909) I. L. R. 31 All. 429, followed.

... .. **No. 1 P. R. 1912**

PROBATE AND ADMINISTRATION ACT.

(1) SECTION 3.

Document dedicating property at once to the worship of Thakurji—not a will.

See *Will* (1).

... .. **No. 5 P. R. 1912**

(2) Section 6 and 50 (4)—application for Probate—reason which alone justify its rejection—Indian Limitation Act, IX of 1908, article 181—not applicable—meaning of testator being of “disposing mind.”

Held, that in proceedings under Act V of 1881, where probate of a will is sought, the Court is bound to grant probate, unless it finds that the will was not executed by the testator or that he was not in a state of mind competent to exercise his testamentary power or that the will was not the testator's own voluntary act, and the Court has no concern with the question whether the will, if proved, will be effectual or valid or whether it can affect certain parts of the property with which it purports to deal.

55 P. R. 1894 (*Mussammat Bali v. Mussammat Hussain Bibi*), *Harmusji Naoroji v. Bai Dhanbaji*, (1887) I. L. R. 12 Bom. 164 and *Barot Parashotam v. Bai Muli*, (1893) I. L. R. 15 Bom. 749, referred to.

PROBATE AND ADMINISTRATION ACT—*concl'd.*

Held also, that article 181 of the Indian Limitation Act, 1908 (which corresponds with article 178 of Act XV of 1877) has no application to petitions for probate.

Kashi Chuadra Deb v. Gopi Krishna Deb, (1891) *I. L. R.* 19 *Cal.* 48, referred to.

Held also, that while the mere execution of a will raises a presumption, that the maker of it knew and approved of its contents, the fact that the testator understood that he was making a will and by it giving the whole of his property to one object of his regard is not sufficient proof that he had a "disposing mind," he must also have capacity to comprehend the nature of the claim of others, whom by his will he is excluding from all participation in his property.

Woomesh Chunder Biswas v. Rash Mohini Dassi, (1893) *I. L. R.* 21 *Cal.* 279, *Harwood v. Baker*, 3 *M. P. O.* 282 and *Safton v. Hopwood*, 1 *F.* and *F.* 179, referred to.

Held further, that when a will was made by a dying woman practically at death's door, behind the back and to the detriment of *caveator* (who was one of the legal heirs) and apparently under the influence of a person who was adverse to the *caveator*, the *onus* of proving that the testatrix had in fact a "disposing mind" rested upon the propounder.

55 *P. R.* 1894 (*Mussammat Bali v. Mussammat Hussain Bibi*) (note) referred to.

... .. No. 20 *P. R.* 1912.

(3) SECTION 90.

Alienation in contravention of—person interested.

See *Custom (Will)*.

... .. No. 14 *P. R.* 1912.

PROBATE OF WILL.

Questions to be considered by Court on application for—

See *Probate and Administration Act* (2).

... .. No. 20 *P. R.* 1912

PUNJAB ALIENATION OF LAND ACT.

(1) SECTIONS 3 AND 14.

See *Limitation* (3).

... .. No. 82 *P. R.* 1912.

(2) SECTION 9.

Reference to Deputy Commissioner in case of a mortgage by conditional sale, after year of grace has expired—Jurisdiction of Civil Court.

The defendant, a member of an agricultural tribe, mortgaged his land to plaintiff by way of conditional sale on 20th March 1896. In October 1900 plaintiff had a notice issued under Regulation XVII of 1806.

PUNJAB ALIENATION OF LAND ACT—*contd.*

The Punjab Alienation of Land Act came into force on the 8th June 1901, the plaintiff applied in 1904, under section 6 of the Act, to the Deputy Commissioner to be granted a mortgage of the land in lieu of his mortgage by way of conditional sale. The Deputy Commissioner ordered the defendant to execute a mortgage for 20 years, and, on the latter failing to do so, decided on 9th September 1904 to take no further action and to relegate the parties to their former rights.

On 24th October 1904, the plaintiff instituted the present suit for possession of the land mortgaged to him. The lower Appellate Court held that the Civil Court had no jurisdiction, and that the case must be referred to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act.

Held, that as the proprietary title of the plaintiff (the former mortgagee) had become complete on expiry of the year of grace, the present suit must be regarded, not as based on the original mortgage but as founded on plaintiffs' proprietary title—and moreover as sub-section (2) of section 9 of the Punjab Alienation of Land Act did not apply to a case where the mortgage was no longer "current" when the suit was instituted—no reference to the Deputy Commissioner under sub-section (3) of the section was called for.

Held also, that the Deputy Commissioner had a discretionary power under section 9 (2), either of putting the mortgagee to his election (as therein provided) or of sanctioning the retention of the conditional sale clause and that the Deputy Commissioner's order of 9th September 1901 must be construed to amount to such a sanction and that for this reason also, no reference to the Deputy Commissioner under sub-section (3) was called for and the Civil Court had jurisdiction to decide the case.

103 P. R. 1901 (F. B.) (*Atar Singh v. Ralla Ram*), referred to.

... **Nc. 31 P. R. 1912.**

(3) Section 9 (3)—*Foreclosure proceedings, whether still "pending" after District Judge's order consigning record to Record room, but before expiry of year of grace—reference to Deputy Commissioner—necessity of strict proof of procedure for foreclosure under Regulation XVII of 1806.*

In February 1909, plaintiff sued for possession as owner of certain land, mortgaged to him by way of conditional sale. Foreclosure proceedings had been taken and notice was issued in October 1900, and in December 1900 the District Judge made an order consigning the record to the Record-room. The year of grace expired in October 1901, and previous to that, on 8th June 1901, the Punjab Alienation of Land Act had come into force. The Lower Courts found that the proceedings for foreclosure has been validly completed.

Held, that on these findings, no reference to the Deputy Commissioner under section 9 (3), Punjab Alienation of Land Act, was called for, as there were no proceedings for the enforcement of the conditional sale clause "pending" before the District Judge after the order in December 1900 consigning the record to the Record-room.

But *held also*, that it was for plaintiff to prove affirmatively that each and all of the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 had been duly fulfilled and that as the notice

PUNJAB ALIENATION OF LAND ACT—*conold.*

issued did not bear the District Judge's seal, as required by section 8, the foreclosure proceedings were bad in law, and consequently, as the mortgage still subsisted, the case must be referred to the Deputy Commissioner under section 9 (3) of the Act for such action as he might think fit to take.

16 P. R. 1888 (*Mussammul Lachmi v. Tota*), 106 P. R. 1889 (*Kirpa Ram v. Bhugwana*), 105 P. R. 1907 (*Bhagirath v. Nath Mal*), *Madhopersaul v. Gajadhar*, (1884) I. L. R. 11 Cal. 111 (117), and 185 P. R. 1889 (*F. B.*) (*Sham Singh v. Karn*), referred to.

... .. No. 59 P. R. 1912.

PUNJAB COURTS ACT.

(1) SECTION 39.

See *Pre-emption* (10).

... .. No. 83 P. R. 1912.

(2) SECTION 39.

Power of Appellate Court to pass any decree necessary in an appeal, it has jurisdiction to entertain.

See *Jurisdiction* (1).

.. ... No. 54 P. R. 1912.

(3) SECTION 40.

Not applicable where judgment of Lower Appellate Court was passed after date when the Amending Act, I of 1912, came into force.

See *Punjab Courts (Amendment) Act*.

.. ... No. 122 P. R. 1912.

(4) SECTION 70 (1) (a).

Wrong decision as to *onus probandi*—no ground for revision.

See *Revision (Civil)* (3).

... .. No. 102 P. R. 1912.

PUNJAB COURTS (AMENDMENT) ACT, I OF 1912.

SECTION 6.

Whether old section 40 of Courts Act is applicable to second appeals from decrees passed after date on which Amending Act came into force.

Held, having regard to the terms of section 6 of Punjab Courts (Amendment) Act, I of 1912, that there is no right of further appeal under section 40, Punjab Courts Act, as it stood prior to its amendment by the Act of 1912, from an appellate decree, passed after the date on which the Amending Act came into force.

156 P. L. R. 1912 (*Ganda Mal v. Piran Ditta*), *Bhadreswar Goloi v. Bishnu Charan Sen*, (1910) 8 Indian Cases 3, *Rajmohan Pal v. Gobinda Chandra Pal*, (1912) 14 Indian Cases 53, *Benod Bihari Bahdra v. Ram Sarup Chamar*, (1912) 16 Cal. W. N. 1015, *Colonial Sugar Refining Company v. Irving*, (1905) L. R. H. of L. and P. C. 369, 12 P. R. 1910 (*F. B.*) (*Narsing Das v. Dholan Das*), *Kalinga Hebbara v. Narasimha Hebbara*, (1911) 21 Mad. L. J. R. 631 and *Hornsey Local Board v. Monarch Investment Building Society*, (1889) L. R. 24 Q. B. D. 1.

... .. No. 122 P. R. 1912.

PUNJAB LAND REVENUE ACT.

SECTION 111.

Widow's right to have joint holding partitioned.

See *Custom (Partition)*.

... .. No. 70 P. R. 1912.

PUNJAB LAWS ACT.

SECTION 16.

Pre-emption—difference between this section and section 22, Punjab Pre-emption Act, II of 1905, discussed.

See *Punjab Pre-emption Act* (10)

... .. No. 114 P. R. 1912.

PUNJAB LIMITATION ACT, I OF 1900.

Limitation for suit by reversioners to recover land sold by their collateral, who died more than twelve years before suit, mutation taking place within twelve years—starting point of limitation—Indian Limitation Act, Article 144.

Plaintiffs sued on 20th February 1909 for possession of land, which their father's brother had alienated by deed, dated 23rd July 1887, on the ground that the sale was without consideration and necessity. The alienor died more than twelve years before suit, but mutation was not effected till 23rd February 1897.

Held, that where the last male owner alienated and died before Punjab Act I of 1900 came into force, the reversioner must sue within twelve years of alienor's death regardless of when mutation was effected upon the alienation and that consequently the present suit was barred by time.

18 P. R. 1895 (*F. B.*) (*Rodha v. Harnam*), 90 P. R. 1904 (*F. B.*) (*Sahib Dad v. Rahmat*), 145 P. R. 1907 (*Miran Bakhsh v. Ahmad*), and 11 P. R. 1909 (*Karm Singh v. Muhammad Din*), referred to.

... .. No. 30 P. R. 1912

PUNJAB PRE-EMPTION ACT.

(1) SECTIONS 2 (2) AND 12.

Pre-emption in respect of sale to a landlord of occupancy rights under section 6 of Tenancy Act.

See *Pre-emption* (4).

... .. No. 36 P. R. 1912.

(2) SECTIONS 3 (1), (3) AND 5.

Sale of agricultural land, situate in suburb of a town—urban immovable property—effect of buildings erected on it since date of sale.

Held, that under the terms of section 3 (1) and (3) of the Punjab Pre-emption Act, II of 1905, land which at the time of the sale was occupied or let for agricultural purposes or for purposes subservient to agriculture and was not occupied as the site of any building in a town or village, is subject to pre-emption under section 5 of the Act, no matter whether it is situate in a town or in a village.

PUNJAB PRE-EMPTION ACT—*contd.*

Held also, that the fact that the land had since the date of the sale been built upon by the vendee, could not alter its character so as to affect the plaintiff's right of pre-emption.

... .. No. 26 P. R. 1912.

(3) SECTION 4.

Expressly allows a pre-emptor to shew that a transaction, ostensibly a mortgage, is in reality a sale.

See *Pre-emption* (9).

... .. No. 67 P. R. 1912.

(4) SECTION 11—*Proviso.*

Meaning of "agnate."

In 1885 plaintiff and his two brothers H. D. and N. D. jointly bought land in village Damla and other villages and were recorded as owners.

In 1890 they effected partition under which the Damla land fell to the share of H. D. and N. D., and the latter having died, his share was entered in the name of his widow. In 1896 the widow died and mutation was effected in the names of plaintiff and H. D.

In 1907 plaintiff brought the present suit for pre-emption in respect of a sale effected on the 3rd December 1906 relying on the *proviso* to section 11 of the Punjab Pre-emption Act.

Held, that the widow of his brother N. D. was not an "agnate" of plaintiff's within the meaning of the section and that consequently plaintiff was not recorded for twenty years previous to the date of sale either in his own name or in that of an agnate, and his suit must therefore fail.

95 P. R. 1901 (*Muhammad Ayub Khan v. Rure Khan*), referred to.

... .. No. 53 P. R. 1912.

(5) SECTION 12.

Each heir has an independent right of pre-emption—consent of father to sale does not affect son's right of pre-emption.

See *Pre-emption* (1).

... .. No. 7 P. R. 1912.

(6) SECTION 13.

Pre-emption of a shop in town of Banga on ground of vicinage.

See *Custom (Pre-emption)* (4).

... .. No. 71 P. R. 1912.

(7) SECTION 13 (1), *fifthly.*

Houses in same blind alley—"common entrance from street."

Where the pre-emptor's house and the house in dispute both opened into a blind alley (*kucha earbasta*) and into the same alley opened

PUNJAB PRE-EMPTION ACT—*contd.*

two other houses, and it was not shown that the alley was the private property of the owners of the four houses or that none, except these persons, had free access to it or a right of way over it—

Held, that the entrance to the alley was not “a common entrance from the street” of the pre-emptor and the vendor within the meaning of section 13 (1) *fifthly* of the Punjab Pre-emption Act.

... .. No. 44 P. R. 1912.

(8) SECTION 19.

Withdrawal of deposit, no bar to appeal—legitimacy of son of a Jat by his wife, a sweeper woman—Benami pre-emptor.

Held, that the withdrawal by the plaintiff in a pre-emption suit of the deposit made under section 19 (1) (a), Punjab Pre-emption Act, subsequent to the decision of the suit by the Court of first instance, is no ground for rejection of the plaint by the Appellate Court and does not bar an appeal by the plaintiff.

Held further, that the fact that the pre-emptor was instigated to prefer his claim by the vendees, who supplied him with the necessary funds on a mortgage of the land sold, apparently with the object of defeating another suit by a rival pre-emptor, does not prove that he is acting *benami* for the vendees and therefore does not debar him from suing.

19 P. R. 1898 (*Ramsukh Das v. Fazal-ud-Din*), and 7 P. R. 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*), followed.

... .. No. 58 P. R. 1912.

(9) SECTIONS 21 (2) AND 29.

See *Limitation* (3).

... .. No. 82 P. R. 1912

(10) SECTION 22.

Price paid and fixed in good faith—market value—Punjab Laws Act, section 16.

Held, that under section 22, Punjab Pre-emption Act, 1905, it is sufficient for the Court to find that the price was fixed in good faith to shut out all enquiry into the market value, and thereupon the price so fixed must be fixed by the Court as the price for the purposes of the suit, no matter whether it is more or less than the market value.

The change of language between section 16, Punjab Laws Act, and section 22, Punjab Pre-emption Act, discussed.

13 P. R. 1908 (*Niadar Mal v. Mukh Ram*) and 47 P. R. 1909 (*Hoa Ram v. Rana Palia*), followed.

... .. No. 114 P. R. 1912.

(11) SECTIONS 25 AND 29.

Period of limitation as between rival pre-emptors—Indian Limitation Act, article 120.

Held, that section 29 of the Punjab Pre-emption Act does not contemplate cases in which two or more rival pre-emptors, having brought

PUNJAB PRE-EMPTION ACT—*concl'd.*

separate suits in respect of the same sale, the plaintiff in each suit is joined as a defendant in each of the other suits under section 25 of the Act, and that consequently the period of limitation as between the rival pre-emptors continues to be six years under article 120 of the Limitation Act.

Durga v. Haidar Ali, (1894) *I. L. R.* 7 *All.* 167, 11 *P. R.* 1893 (*Mutsadda Singh v. Hamira*), and 20 *P. R.* 1908 (*Ram Parshad v. Ganga Datt*), referred to.

... .. No 80 P. R. 1912.

PUNJAB TENANCY ACT.

(1) SECTIONS 6, 53, 56 AND 60.

Pre-emption in respect of sale to a landlord of occupancy rights under section 6.

See *Pre-emption* (4).

... .. No 36 P. R. 1912.

(2) SECTION 53.

Sale of occupancy holding to landlord—right of mortgagee, who is dissatisfied with amount of mortgage money fixed by Revenue officer, to bring suit for a declaration—Specific Relief Act, I of 1877, section 42.

Held, that where an occupancy holding is sold to the landlord under the provisions of section 53 of the Punjab Tenancy Act, the tenancy becomes extinct and the land passes to the landlord unincumbered by any mortgage created by the tenant, the mortgage-debt, if any, becoming a charge upon the purchase money.

Held also, that where the amount of the mortgage charge is in dispute and the Revenue officer has decided in favour of the mortgagor, the mortgagee is entitled to bring a suit under section 42 of the Specific Relief Act for a declaration in regard to the sum claimed by him to be due under his mortgage.

... .. No 23 P. R. 1912.

(3) SECTION 59.

Succession by adopted son among non-agricultural Banias—Delhi District.

See *Custom (Adoption)* (2).

... .. No 88 P. R. 1912.

(4) SECTION 77 (3) (e).

Suit by mortgagee against mortgagor for possession—landlord and tenant.

See *Joint mortgage*.

... .. No 50 P. R. 1912.

(5) SECTION 77 (3) (h).

Applicable to suit by landlord to dispossess a mortgagee of an occupancy holding, which has expired owing to death of occupancy tenant.

See *Jurisdiction (Civil or Revenue Court)* (1).

... .. No 32 P. R. 1912

PUNJAB TENANCY ACT.

(6) SECTION 77 (3) (j).

Suit for declaration in respect of right to collect village dues against persons claiming similar rights—jurisdiction—Civil or Revenue Court—Specific Relief Act, I of 1877, section 42 proviso—no bar to such suit—right not acquired merely by acquiring right to site of a house in the abadi.

Plaintiffs, proprietors of *Patti Kamal, Mauza Jamlera*, sued for a declaratory decree to the effect that they alone were entitled to collect village dues, such as *dhart* in the *abadi* Bara Shah—

Held, that a suit, such as this, between parties, each of whom claims to be entitled to collect the dues, does not fall within the purview of clause (j) of section 77 (3) of the Tenancy Act, when the persons from whom such dues are claimable are not parties to the suit.

204 P. R. 1889 (*Hayat Shah v. Jawaya*), followed.

Held also, that the plaintiffs were not debarred by the *proviso* to section 42, Specific Relief Act, from suing for a mere declaration in respect of those dues.

Held further, that the mere fact that defendants had by adverse possession (if such had been proved) acquired proprietary rights to the sites in the *abadi* occupied by them, would not as a necessary consequence have given them all the rights possessed by the proprietary body of the *patti* in which that *abadi* is situate and the *onus* of proving the acquisition of such rights was consequently upon them.

... .. No. 110 P. R. 1912.

Q

QURAISHI SHEIKHS.

Qasba Thoru—Gurgaon District—governed by custom.

See *Custom (Alienation)* (12).

... .. No. 79 P. R. 1912.

R

RAILWAYS ACT.

See *Indian Railways Act*.

RAILWAY ADMINISTRATION.

Which—can be sued and where, for damages to through-booked traffic.

See *Indian Railways Act*.

... .. No. 111 P. R. 1912.

RAJPUTS.

Rupar Tahsil—succession to self-acquired property, daughter or collaterals.

See *Custom (Succession)* (11).

... .. No. 52 P. R. 1912.

REDEMPTION.

Of prior mortgage by puisne mortgagee, who has agreed to redeem, must be done in reasonable time.

See *Mortgage* (5).

... .. No. 66 P. R. 1912.

REGISTRATION ACT.

See *Indian Registration Act*.

REGULATION XVII of 1806.

Necessity of strict proof of procedure for foreclosure under—

See *Punjab Alienation of Land Act* (3).

... .. No. 59 P. R. 1912.

RELATIONSHIP.

(1) Proper method of computing—

See *Custom (Succession)* (4).

... .. No. 19 P. R. 1912.

(2) Degrees of—how computed—among Pathans—Mianwali Tahsil.

See *Custom (Alienation)* (4).

... .. No. 29 P. R. 1912.

RES JUDICATA.

(1) Question decided in previous pre-emption suit against vendee and vendor, which resulted in dismissal of the pre-emption suit—whether *res judicata* in subsequent suit by vendee against vendor for possession.

Plaintiff sued C. for possession of land sold to him by A. acting as attorney for his wife C. A having died since, C. was the only defendant in the case. Three persons had previously sued the plaintiff and A. for pre-emption and in this case plaintiff had admitted the rights of the claimants to pre-empt and pleaded that full consideration had passed, while C. contended that the sale was invalid, as her husband had no authority to effect it. Her plea was successful in the first Court and the pre-emptor's appeal to the Divisional Court was dismissed, as was also a subsequent application by them for revision to the Chief Court.

Held, that in the present suit the question whether the husband had or had not authority to effect the sale was not *res judicata* by reason of the finding on this point in the pre-emption suit.

Jamna Singh v. Kamar-un-Nisa, (1880) 1. L. R. 3 All. 152 (F. B.) and *Krishnu Chandra v. Mohesh Chandra*, (1905) 9 Cal. W. N. 584, referred to.

... .. No. 42 P. R. 1912.

RES JUDICATA - *concl'd.*

(2) *Issue decided in a previous suit in which the parties were co-defendants.*

A widow sold her occupancy rights to the present plaintiffs. The reversioners sued to contest the alienation, impleading both the widow and the present plaintiffs. The widow denied sale and receipt of consideration. Among the issues framed was one whether consideration passed. This was decided against the present plaintiffs, who then sued the widow for possession of the land sold to them.

Held, that the question of payment of consideration for the alleged sale was *res judicata* between the parties.

Balambhat v. Narayanbhat, (1900) *I. L. R.* 25 Bom. 74, *Rama Chandra Naraydn v. Narayan Mahader*, (1883) *I. L. R.* 11 Bom. 216, 140 P. R. 1890 (*Nehal Singh v. Chanda Singh*), *Mogai Ram v. Mehdi Hossain Khan*, (1903) *I. L. R.* 31 Cal. 95, and *Venkayya v. Narasamma*, (1887) *I. L. R.* 11 Mad. 204, followed.

... No. 103 P. R. 1912.

REVIEW.

• Not applicable to Guardian and Wards Act.

See *Guardian and Wards Act* (2).

... No. 116 P. R. 1912.

REVISION (CIVIL).

(1) *Of order directing plaintiffs to make up deficiency in Court-fee—Civil Procedure Code, Act V of 1908, section 2 and order 7, rule 11—decree.*

Held, that an order directing a plaintiff to make up a deficiency in Court-fee by a certain date is not open to revision by the Chief Court.

82 P. R. 1911 (*Mir Umar Ali v. Mussammat Nasib-un-Nissa*), followed.

146 P. R. 1908 (*Siri Dhar v. Amar Nath*), distinguished.

... No. 69 P. R. 1912.

(2) *Revision of an order admitting a suit in forma pauperis—not admissible.*

Held, that no revision lies to the Chief Court from an order admitting a suit *in forma pauperis*.

Muhammad Ayub v. Muhammad Mah. ul, (1910) *I. L. R.* 32 All. 623, followed.

99 P. R. 1882 (*Sheikh Muhammad Mubarik v. Sheikh Fazl Ilahi*), referred to.

... No. 87 P. R. 1912.

(3) *Punjab Courts Act, XVIII of 1884, section 70 (1) (a)—wrong decision as to onus probandi, no ground for revision under clause (a)—the distinction between clause (a) and clause (b) of section 70 pointed out.*

Plaintiff as collateral of one K. N., deceased, a Jukha of mauza Mararah, Gurdaspur tahsil and District, sued for cancellation of the

REVISION (CIVIL)—*conclld.*

sale of a house made by K. N.'s widow, as being without necessity. The lower Appellate Court held that the burden of establishing a custom limiting the widow's power of alienating the property in suit was on the plaintiff, who had failed to discharge it, and dismissed the suit. Plaintiff applied to the Chief Court in revision under section 70 (1) (a) of the Punjab Courts Act on the ground *inter alia* that the *onus probandi* had been wrongly laid.

Held, that as the lower Appellate Court had not ignored the point but dealt with it fully, the Chief Court was not competent in revision under section 70 (1) (a) of the Courts Act to consider the correctness of the decision.

The distinction between the provisions of clause (a) and clause (b) of section 70 (1) pointed out.

64 P. R. 1885 (*Rama v. Jowahir*), 22 P. R. 1886 (*Hari Singh v. Dit Mal*), *Sundur Singh v. Doru Shankar*, (1897) I. L. R. 20 All. 78 and *Amir Hassan Khan v. Sheo Bakhsh Singh*, (1884) I. L. R. 11 Cal. 6 (P. C.) referred to.

... .. No. 102 P. R. 1912.

(4) Order of remand by lower Appellate Court from which no further appeal lies, not open to—

See *Civil Procedure Code*, 1908 (8).

... .. No. 119 P. R. 1912.

(5) Where Court below has adopted procedure not prescribed by law.

See *Civil Procedure Code*, 1908 (6).

... .. No. 125 P. R. 1912.

RIGHT OF WAY.

Across *shamilat*, set aside for a road—suit to remove obstruction—special damage.

See *Village Shamilat*.

... .. No. 9 P. R. 1912.

RIWAJ-I-AM.

(1) Jullundur District—Succession of husband to wife's property.

See *Custom (Succession)* (1).

... .. No. 4 P. R. 1912.

(2) Rawalpindi—question 46. Gift in lieu of dower.

See *Custom (Alienation)* (1).

... .. No. 12 P. R. 1912.

(3) Lahore district, page 10. Among Jats, daughters and sisters have no right of inheritance.

See *Custom (Alienation)* (2).

... .. No. 13 P. R. 1912.

RIWAJ-I-AM—contd.

(4) Ludhiana—Succession of pattidars to heirless estates.

See *Custom (Succession)* (3).

... .. **No. 16 P. R. 1912.**

(5) Ludhiana District—*re* exclusion of daughters in succession to self-acquired property,

See *Custom (Succession)* (5).

... .. **No. 25 P. R. 1912.**

(6) Ludhiana *tahsil*—succession of adopted son to property of his natural father.

See *Custom (Succession)* (9).

... .. **No. 45 P. R. 1912.**

(7) Ludhiana District—Gujars—Succession by widow in presence of a son.

See *Custom (Succession)* (14).

... .. **No. 85 P. R. 1912.**

(8) Sialkot District—Chundawand or pagwand succession.

See *Custom (Succession)* (6).

... .. **No. 27 P. R. 1912.**

(9) Sialkot District—succession by descendants of adopted son in natural family.

See *Custom (Succession)* (10).

... .. **No. 49 P. R. 1912.**

(10) Mianwali *tahsil*—Succession of daughters among Pathans.

See *Custom (Alienation)* (4).

... .. **No. 29 P. R. 1912.**

(11) Thanesar *tahsil*—in regard to succession of heirless estate.

See *Custom (Succession)* (12).

... .. **No. 7 P. R. 1912.**

(12) Multan District—unrestricted powers of Muhammadan *Sahu* Jats in matters of alienation.

See *Custom (Alienation)* (10).

... .. **No. 73 P. R. 1912.**

(13) Gurgaon District—restriction in power of alienation.

See *Custom (Alienation)* (12).

... .. **No. 79 P. R. 1912.**

RIWAJ-I-AM—concl'd.

(14) Jhelum District—*Mauza Mangalwal—tahsil Chakwal, Kassars*
—will in favour of sister.

See *Custom (Alienation)* (14).

... .. No. 98 P. R. 1912.

(15) Jhelum District—Kassars—will in favour of sister.

See *Custom (Alienation)* (14).

... .. No. 98 P. R. 1912.

(16) Jhelum District—Awans—power of alienation.

See *Custom (Alienation)* (15).

... .. No. 100 P. R. 1912.

(17). Rawalpindi and Attock Districts—succession by widows and
daughters in presence of sons—Khattars, Fatehjang, *tahsil*.

See *Custom (Succession)* (16).

... .. No. 112 P. R. 1912.

S

SALE.

By registered deed—failure to pay consideration, does not prevent
the registration antedating to date of execution of deed.

See *Indian Registration Act, 1877* (2).

... .. No. 105 P. R. 1912.

SHAMILAT.

Portion of, set aside for road—obstruction of—special damage.

See *Village Shamilat*.

... .. No. 9 P. R. 1912.

SHEIKHS.

Of Delhi City—governed by Muhammadan Law, and not by custom,
in matters of succession.

See *Custom (Succession)* (17).

... .. No. 113 P. R. 1912.

SHEIKHS (ANSARI).

Jullundur District—custom of alienation and adoption.

See *Custom (Alienation)* (16).

... .. No. 126 P. R. 1912 (P. C).

SMALL CAUSE.

Suit for a share in *dharat*, collected by defendant.

See *Jurisdiction (Civil or Revenue Court)* (4).

... .. No. 120 P. R. 1912.

SPECIFIC RELIEF ACT.

(1) SECTION 21, last clause.

Applicability of—to submissions falling within section 3 of Indian Arbitration Act.

See Arbitration (1).

... ..

No. 37 P. R. 1912.

SECTION 21, LAST CLAUSE.

Agreement to submit to arbitration made out of Court during pendency of suit—no bar to suit—Civil Procedure Code, 1882, sections 506, 523 and 525—Civil Procedure Code, 1908, schedule 2, sections 1, 17 and 20.

Held, that during pendency of a suit, it is not competent to the parties to refer the matter in dispute to arbitration without the intervention of the Court, and, after an award has been made by the arbitrators, to apply to the Court that the award be filed.

Held also, that sections 523 and 525 of the old Code and the corresponding sections 17 and 28 of schedule II of the new Code, apply only to cases where there is no pending litigation.

Held further, that the last clause of section 21 of the Specific Relief Act does not apply to an agreement to refer to arbitration made during the pendency of a suit, and the Court cannot take cognizance of arbitration proceedings to which its sanction has not been accorded in the manner laid down in section 506 of the old Code or section 1, schedule II of the new Code.

130 P. R. 1882 (*Budha v. Haku*), 50 P. R. 1891 (*Fakir v. Jaimal*), 25 P. R. 1902 (P. C.) (*Ghulam Jilani v. Muhammad Hassan*), *Khatija v. Ismail*, (1889) I. L. R. 12 Mad. 380 (386), *Tincowry Dey v. Fakir Chand Dey*, (1902) I. L. R. 30 Cal. 218 (228) and *Kubra Jan v. Ram Bali*, (1905) 5 All. L. J. R. 647 (653); I. L. R. 30 All. 560 (F. B.), referred to.

Harivalabdas Kallindas v. Utamchand Manekchand, (1879) I. L. R. 4 Bom. 1, *Salig Ram v. Jhunna Kuar*, (1882) I. L. R. 4 All. 546, *Sheoambar v. Dedat*, (1886) I. L. R. 9 All. 168 and *Sheo Dat v. Sheoshankar Singh*, (1904) I. L. R. 27 All. 53, dissented from.

... ..

No. 115 P. R. 1912.

(3) SECTION 42.

Suit for declaration that mortgage-charge is greater than amount fixed by Revenue officer, maintainable.

See Punjab Tenancy Act, (2).

... ..

No. 23 P. R. 1912.

(4) Section 42, proviso—not applicable to suit under section 283, Civil Procedure Code, 1882.

Held, that the proviso to section 42 of the Specific Relief Act has no application to suits instituted under the provisions of section 283 of the Civil Procedure Code, 1882.

Kristnam Sooraya v. Pathma Bee, (1905) I. L. R. 29 Mad. 151 (F. B.), *Ambu v. Kellilamma*, (1890) I. L. R. 14 Mad. 23 and 51 P. R. 1897 (p. 238) (*Sardar Dial Singh v. Beli Ram*), followed.

Kunhiamma v. Kunhunni, (1892) I. L. R. 16 Mad. 140 distinguished.

... ..

No. 10 P. R. 1912.

SPECIFIC RELIFF ACT—*concl'd.*

(5) SECTION 42 *proviso.*

Suit for declaration in respect of right to collect village dues—
further relief.

See Punjab Tenancy Act (6).

... .. **No. 110 P. R. 1912**

(6) SECTION 43.

Suit for declaration in respect of an alienation by a widow with
consent of nearest collaterals.

See Hindu Law (3).

... .. **No. 46 P. R. 1912.**

STAMP ACT.

See Indian Stamp Act.

SUCCESSION.

*To land granted to a person and his al aulad—meaning of word
al aulad—includes daughter.*

*Held, that the word al aulad means offspring of any kind and that
therefore a daughter is entitled to succeed to land granted to her
father and his al aulad.*

... .. **No. 76 P. R. 1912.**

See also CUSTOM (SUCCESSION).

T

TESTATOR.

“Disposing mind ” explained.

See Probate and Administration Act (2).

... .. **No. 20 P. R. 1912.**

TRANSFER OF PROPERTY ACT.

SECTION 53.

*Principles of, applicable in Punjab—gift to wife on account of natural
love and affection, not for consideration—inference from fact that the
alienation has in fact defeated and delayed creditors—suit should be on
behalf of all creditors.*

*Held, that the provisions of section 53 of the Transfer of Property
Act, being in accordance with general principles of justice, equity and
good conscience, should be taken as a guide by the Courts of this
Province.*

6 P. R. 1901 (*Lakhmi Narain v. Tara Singh*), followed.

*Held also, that a gift of property to a wife “on account of natural
love and affection ” is not a transfer “for consideration ” within the
purview of the section,*

TRANSFER OF PROPERTY ACT—*concl'd.*

Held also, that a gratuitous transfer, which does in fact defeat or delay the creditors of the transferor, gives rise to the inference that it was the intention of the transferor to defraud his creditors—and it will then be incumbent on the alienee to show that at the time the transfer was made, the transferor had undisposed assets, sufficient to discharge his debts.

Burjorji Dorabji v. Dhunbai, (1891) *I. L. R.* 16 *Bom.* 1 (*pp.* 14 and 19-21) and *Chidambara Pothan v. Poongavanam*, (1909) 2 *Indian Cases* 813, referred to.

Held further, that a suit to set aside a fraudulent transfer should be brought by, or on behalf of, all the creditors of the transferor.

Burjorji Dorabji v. Dhunbai, (1891) *I. L. R.* 16 *Bom.* 1 (*pp.* 14 and 19-21) and *Hakim Lal v. Mooshahar Sahu*, (1907) *I. L. R.* 34 *Cal.* 999 (*p.* 1006), referred to.

... .. No. 74 P. R. 1912.

TRUSTS ACT.

See *Indian Trusts Act*.

TRUST PROPERTY.

Can be followed into the hands of any one, in whose hands it can be identified.

See *Indian Trusts Act* (2).

... .. No. 101 P. R. 1912.

V

VALUATION OF SUIT.

(1) To have mortgage on half share in houses declared null and void.

See *Hindu Law* (1).

... .. No. 21 P. R. 1912.

(2) Pre-emption suit in respect of agricultural land.

See *Pre-emption* (10).

... .. No. 83 P. R. 1912.

VILLAGE ABADI.

Rights of *qabza maliks* in regard to their houses.

See *Custom (Alienation)* (5).

... .. No. 39 P. R. 1912.

VILLAGE DUES.

Suit for declaration in respect of right to collect—jurisdiction—further relief—acquisition of right.

See *Punjab Tenancy Act* (6).

... .. No. 110 P. R. 1912.

VILLAGE SHAMILAT.

Set aside for a road—obstruction of—suit by some of the proprietary body—special damage.

Held, that in a suit by some of the proprietary body, to restore the use as a road of land, set aside in partition of the village *shamilat* for the purpose of a road, it is not necessary for the plaintiffs to prove special damage to themselves, apart from the damage caused to the public, as a condition precedent to obtaining a decree.

73 P. R. 1882 (*Ghan Singh v. Sadda Singh*), 74 P. R. 1885 (*Chuhar Singh v. Dhaunkul Singh*), and 4 P. R. 1895 (*Chajju Mal v. Ganda Mal*), referred to.

... .. No. 9 P. R. 1912.

W

WAIVER.

By pre-emptor.

See *Pre-emption* (6).

... .. No. 48 P. R. 1912.

WAJIB-UL-ARZ.

(1) of *Mauza Eminabad*—not applicable to *Khatri's*.

See *Custom (Succession)* (7).

... .. No. 38 P. R. 1912.

(2) Entry in—restricting powers of non-proprietors in regard to their houses—not applicable to *qabza maliks*.

See *Custom (Alienation)* (5).

... .. No. 39 P. R. 1912.

WAZF.

Creation of—without written deed.

See *Indian Trusts Act* (1).

... .. No. 106 P. R. 1912.

WIDOW.

Right of—to have joint holding partitioned.

See *Custom (Partition)*.

... .. No. 70 P. R. 1912.

WILL.

(1) *Definition of—property dedicated to religion—Probate and Administration Act, V of 1881, section 3.*

Held, that a document, by which a Hindu dedicated certain houses to the worship of *Sri Thakurji*, declared that he himself would be the manager of the property during his lifetime, and after his death ap-

WILL—concl'd.

pointed a committee of 3 persons to become manager in his stead, was not a will within the meaning of section 3 of the Probate and Administration Act, 1881.

Chaitanya Gobinda v. Dayal Gobinda, (1905) *I. L. R.* 32 *Cal.* 1082, referred to.

In the goods of H. B. Beresford, deceased, (1871) 15 *W. R.* 456 (459), differentiated.

... .. **No. 5 P. R. 1912.**

(2) Among Pathans.

See *Custom (Will)*.

... .. **No. 14 P. R. 1912.**

(3) Capacity of making a proper will—"disposing mind" explained.

See *Probate and Administration Act* (2).

... .. **No. 20 P. R. 1912.**

(4) *By Hindu—bequest to one daughter with full ownership and after her death to another daughter—construction of—*

Where a Hindu, who had two daughters, one Mussammat Durga Devi (a widow) and the other Mussammat Hukam Devi (married), left a will, stating that his collaterals were to have no share in his property which he bequeathed to his daughter Mussammat Durga Devi adding "*jaisa ab main malik hun, waisa hi bad mere marne ke Mussammat Durga Devi malik hogi, agar Durga Devi mazkur faut ho jawegi to phir tamam jaidad ki malik aur kabiz Hukam Devi hogi.*"

Held, that reading the will as a whole and having regard to the wishes of the testator, as gathered from the general tenor of the document, the testator intended that Durga Devi should succeed in the first instance for her life in the event of her predeceasing her sister, and that she should have an absolute estate only if she survived her sister and that on her death in the lifetime of her sister Hukam Devi, the latter should succeed and have an absolute estate, the collaterals being entirely excluded.

"... .. **No. 65 P. R. 1912.**

Chief Court of the Punjab.

CIVIL JUDGMENTS.

No. 1.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

MUSSAMMAT FATMA—(PLAINTIFF)—APPELLANT,

Versus

MUSSAMMAT IMTIAZI JAN *alias* CHUNI JAN AND
OTHERS, —(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1107 of 1908.

Principal and agent—suit against agent for account—suit against heir of deceased agent—limitation—Indian Limitation Act, IX of 1908, Schedule II, articles 62, 89 and 120.

Held, that the refusal of an agent to render accounts mentioned in article 39, Limitation Act, must be an express refusal on a definite date and not merely a virtual refusal to be inferred from the omission or failure on his part to fulfil a promise made by him to render the account to the principal, in answer to a demand by the latter.

Hari Narain Ghose v. Administrator-General ⁽¹⁾ dissented from; *Easin Sarkar v. Barada Kishore* ⁽²⁾ differentiated.

Held also, that neither article 62 nor article 89 is applicable to a suit against the heir of a deceased agent for rendition of accounts and payment of the amount proved due out of the deceased's estate, but that such a suit is governed by article 120 and limitation begins to run from the date of the agent's death.

96 P. R. 1886 (*Seth Chand Mal v. Kalian Mal*) ⁽³⁾, *Gurudas Pyne v. Ram Narain Sahu* ⁽⁴⁾ and *Ras Girraj Singh v. Ram Raghbir* ⁽⁵⁾ followed.

First appeal from the order of Lala Sri Ram Poplai, Additional District Judge, Delhi, dated 21th August 1908.

Muhammad Shafi and Shadi Lal, for appellant.

Sheo Narain, Shah Nawaz and Abdul Kadir, for respondents.

⁽¹⁾ (1878) 3 Cal. L. R. 446.

⁽²⁾ (1909) 11 Cal. L. J. 43.

⁽³⁾ 96 P. R. 1886.

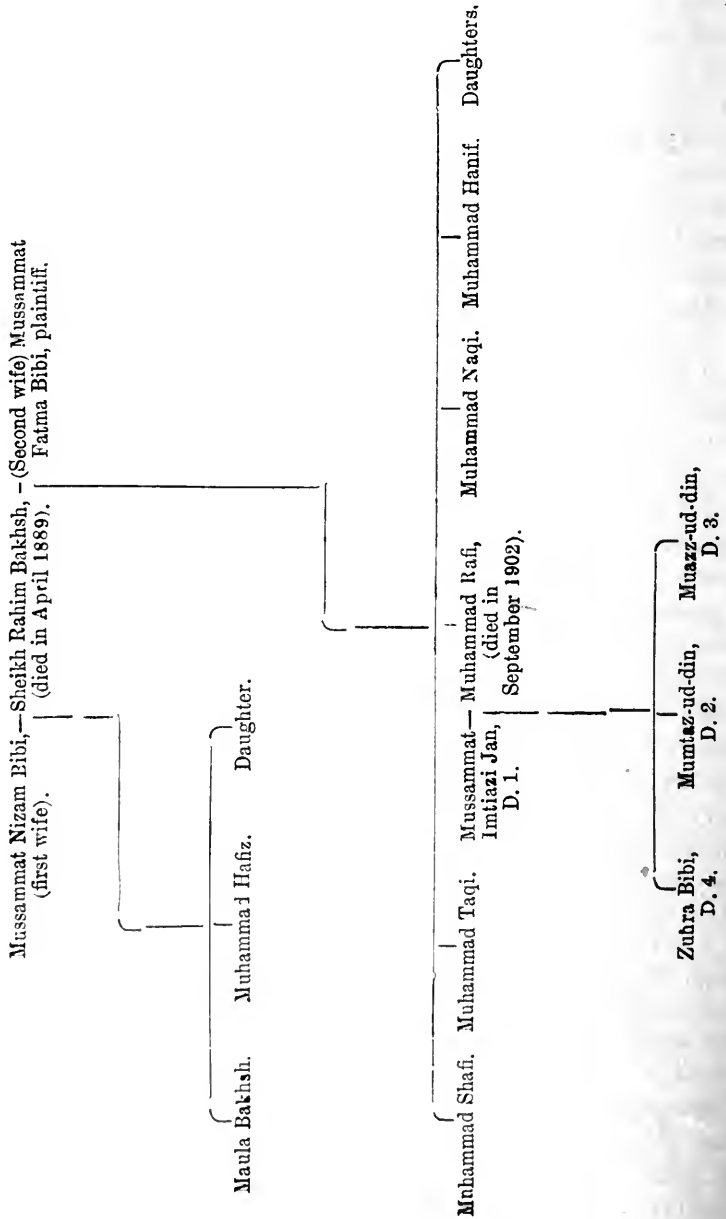
⁽⁴⁾ (1884) I. L. R. 10 Cal. 860.

⁽⁵⁾ (1909) I. L. R. 31 All. 429.

The judgment of the Court was delivered by—

1st April 1911.

SHAH DIN, J.—The following pedigree-table will help to an understanding of the facts of this case :—



Sheikh Rahim Bakhsh, a rich merchant of Lahore, had two wives, Mussammat Nizam Bibi and Mussammat Fatma Bibi. By his first wife, Mussammat Nizam Bibi, he had two sons and one daughter, and by his second wife, Mussammat Fatma Bibi, he had five sons and several daughters. By a registered deed, dated the 16th February 1872, Sheikh Rahim Bakhsh gifted to his second wife, Mussammat Fatma Bibi, four properties which are set out in detail at page 4 of the printed record. This was followed by another registered deed, dated the 12th May 1873, by which Muhammad Shafi, eldest son of Sheikh Rahim Bakhsh by his second wife, gifted in favour of his own mother five bungalows situated in the Mian Mir Cantonment and Lahore, the details of which are given at page 7 of the paper-book. On the 11th November 1876 Sheikh Rahim Bakhsh, before proceeding to Mecca on pilgrimage, executed another deed of gift under which, after settling the greater part of his property, both moveable and immoveable on his minor sons, Muhammad Rafi and Muhammad Naqi, out of the residue he gifted to their mother, Mussammat Fatma Bibi, a sum of Rs. 1,000 and in addition thereto allowed her an annuity for her life at the rate of Rs. 20 *per mensem* chargeable on and to be paid out of the income of the estate conveyed to Muhammad Rafi and Muhammad Naqi. Sheikh Rahim Bakhsh returned from Mecca and continued to carry on business as a general merchant in Lahore until his death, which took place at Delhi in April 1889. Both Muhammad Shafi and Muhammad Taqi had predeceased Sheikh Rahim Bakhsh; so at the time of his death Muhammad Rafi was his eldest surviving son by Mussammat Fatma Bibi. Muhammad Rafi appears to have obtained the age of majority towards the end of 1889 or in the beginning of 1890, but Muhammad Naqi was at that time admittedly a minor and he remained a minor for some years.

Towards the end of 1889 Mussammat Nizam Bibi and her issue brought a suit (original suit No. 330 of 1889) in the Court of the District Judge, Delhi, against Mussammat Fatma Bibi and her issue for partition of the whole of the property alleged to have been left by Sheikh Rahim Bakhsh, on the allegation that the said property was in the possession of the then defendants, and that they had refused to give the then plaintiffs their proper share. In that suit the then defendants including Muhammad Rafi pleaded, *inter alia*, that the bulk of the property then in dispute had been gifted by the late Sheikh Rahim Bakhsh, by registered deeds, dated the 16th

February 1872, 12th May 1873, and 11th November 1876, in favour of Mussammat Fatma and Muhammad Rafi and Muhammad Naqi, respectively, and that the suit in respect of the properties covered by the said deeds of gift, must therefore fail. One of the issues framed by the Court in that suit was as follows :—

“ Are the three gifts of the 16th February 1872, 12th May 1873 and 11th November 1876, valid? Were they acted upon ?” Upon this issue the District Judge found with reference to the gifts of 1872 and 1873 “ that the gifts in question were complete being accompanied by possession and that this possession “ had continued unbroken and uninterrupted in the lifetime “ of the donors. The gifts were therefore valid,” (p. 19 of the record) Similarly with regard to the gift of 1876, the Judge held that it “ was a valid one and that it was fully and completely acted upon so far as it could have been ” (p. 21). As a result of his findings on the whole case, the District Judge, on the 13th May 1891, decreed the then plaintiffs’ claim against Muhammad Rafi only in respect of the three properties which he held to have constituted Rahim Bakhsh’s paternal estate and which had not been gifted away by him. We have referred to this litigation of 1889-91 because the pleadings of the parties in that suit with respect to the gifts of 1872, 1873 and 1876, the issue drawn by the District Judge regarding their genuineness and validity and the finding recorded by him on that issue have a bearing on the present litigation in connection with the question of *res judicata*, which has been raised by the present defendant-respondent No. 1 and has been decided against her by the Lower Court. Since the death of her husband in 1889 Mussammat Fatima Bibi seems to have lived peaceably with her sons of whom Muhammad Rafi was the eldest and he as the eldest male member of the family appears to have managed the family business and to have had in his hands the control of the extensive family estate, consisting of valuable house and shop property situate in Lahore, Mian Mir and Delhi. Muhammad Rafi died in September 1902 ; and thereafter Muhammad Naqi is said to have assumed the control and management of the family business and the family estate. The suit out of which the present appeal has arisen, was brought on the 14th July 1905, by Mussammat Fatma, against Mussammat Imtiaz Jan, widow of Muhammad Rafi, and against his sons and daughter, Mumtaz-ud-din, Muazz-ud-Din and Zuhra Bibi (who are all minors), for rendition of account, the suit being valued

at Rs. 10,500. The principal allegations, on which the suit was based, were that the plaintiff was the owner of the property described in the list attached to the plaint, consisting of 18 bungalows in Lahore and Mian Mir and one house in Delhi; that after the death of her husband she made over the management of the said property to her son Muhammad Rafi who continued to realize the rent thereof as her agent and on her behalf till his death on the 10th September 1902; that Muhammad Rafi had also realized, as her agent, the sum of Rs. 1,000 and Rs. 20 *per mensem* which had been gifted to her by her husband (under the deed of 1876); that Muhammad Rafi during his lifetime had not rendered to the plaintiff an account of the rents and profits of the said property; and that after his death the defendants, who were his heirs, had also not rendered any account, although they had been called upon to do so. The plaintiff prayed that defendants be called upon to render an account of the income of the property and of the sum of Rs. 1,000 cash and of Rs. 20 *per mensem* which Muhammad Rafi had realized as her agent; that a decree for the amount found due by the deceased be passed against his property and that all such directions as may be necessary for rendition of account and recovery of money due to plaintiff be issued.

In answer to the plaint, defendant No. 1, who is principal defendant in the case, filed a written statement on the 1st November 1905, in which she pleaded in substance that the plaintiff was not owner of the property referred to in the plaint; that she had never made over the management of the said property to Muhammad Rafi; that Muhammad Rafi had never realized the rents, and profits of the said property on behalf of the plaintiff, and that the suit was barred by limitation. The defendants Nos. 2 to 4 also filed a written statement through their guardian Muhammad Naqi, in which the plaintiff's claim was practically admitted. On the 2nd November 1905 the District Judge (Mr. Harcourt) framed six issues. The first of which was "whether the suit as framed is barred by time." After the issues had been framed the District Judge thought it necessary to examine the plaintiff and defendant No. 1 as parties, and as they were both *parda-nashin* ladies their statements were taken by commission on the 12th December 1905 (pp. 32 to 34 of the record). After several adjournments the case came up for hearing before Mr. Ellis who had succeeded Mr. Harcourt as District Judge; and Mr. Ellis took down the statements of the pleader for the plaintiff and of the Counsel for defendant No. 1 on the 16th May and 29th May 1906,

respectively (pp. 36 to 38). The learned District Judge then framed the following issues :—

(1) Were the respective gifts of February 1872, May 1873 and November 1876 duly and properly executed ?

(2) If executed, were they not intended to be operated on, *i. e.*, were they merely made with intent to defeat the rights of other heirs ?

(3) Are the pleas of non-knowledge of the deeds and the intention of non-operation inconsistent and cannot the defendant raise the pleas ?

(4) With respect to the deed of 1873, had Muhammad Shafi the power to convey irrespective of the authorization of his father and did he receive such authorization ?

(5) Did plaintiff appoint Muhammad Rafi, as her agent, to recover rents, and if so, for what period ?

(6) If so, does a suit for accounts against the heirs of an agent not lie ?

(7) Is defence estopped by former pleadings ?

These issues, it will be observed, are in some respects different from the issues framed by Mr. Harcourt on the 2nd November 1905, and it is worthy of note that no issue on the point of limitation was drawn. Of the above issues, the most important are the first, the second, the fifth, and the seventh issues, of which the first two and the last are connected together and bear upon the question whether or not the plaintiff is the owner of the property set forth in the list attached to the plaint, and in respect of the management of which she alleges that she appointed her son Muhammad Rafi as her agent. The fifth issue relates to the alleged relationship of principal and agent between the plaintiff and Muhammad Rafi and is the most material issue in the case. The other issues have not been discussed before us and may therefore be left out of consideration. With reference to the four issues just mentioned, the Lower Court (Lala Sri Ram Poplai) has held (1) that the three gifts of 1872, 1873 and 1876 were made merely with the object of defeating the rights of Rakim Bakhsh's first wife, Mussamat Nizam Bibi, and her children and were not acted upon ; but (2) that defendant No. 1 as representative of Muhammad Rafi, was precluded by section 13 of the Civil Procedure Code, 1882, from setting up a defence founded on the fictitious nature of the said gifts, as the question of the genuineness and validity of those gifts was *res judicata* between the parties by reason

of the decision of the District Judge of Lahore, dated the 13th May 1891, in original suit No. 330 of 1889 ; (3) that the plaintiff has failed to show that Muhammad Rafi was appointed by her as her agent to manage on her behalf the property referred to in the plaint and to receive the rents and profits thereof ; (4) that all that has been shown is that Muhammad Rafi acted as plaintiff's agent in realizing the income of the said property, not in his private capacity as plaintiff's son but in his capacity as the manager of the firm of Muhammad Rafi and Brothers, of which he was the senior partner. As a result of the above finding, the Lower Court has held that the plaintiff had no cause of action as regards the rendition of accounts against the defendants in their private capacity as heirs of Muhammad Rafi, but that she was at liberty to sue them and other members of the firm of Muhammad Rafi and Brothers on the ground that Muhammad Rafi, as a partner of that firm, had managed her property and received the income thereof. The plaintiff's suit has therefore been dismissed.

From the decree of the District Judge an appeal has been preferred to this Court by the plaintiff, and we have heard the appeal argued at great length on both sides. The questions which require determination in this appeal are ;—

- (1) Whether the plaintiff's suit was in whole or in part barred by limitation.
- (2) Whether the decision of the District Judge of Lahore, dated the 13th May 1891, in original suit No. 330 of 1889, operates as *res judicata* between the parties as regards the question of the genuineness and validity of the three gifts of 1872, 1873 and 1876, respectively.
- (3) Whether, if the said decision does not operate as *res judicata*, the aforesaid gifts were duly executed and acted upon and were valid.
- (4) Whether Muhammad Rafi acted as plaintiff's agent in managing the property that belonged to the plaintiff under the gifts in question and in realising the rents and profits thereof.
- (5) Whether, if Muhammad Rafi acted as plaintiff's agent in the management of the said property in his capacity as senior partner in the firm of Muhammad Rafi and Brothers, the defendants, as heirs of Muhammad Rafi, were alone liable to the plaintiff in a suit for rendition of accounts without

the other members of the firm being joined as defendants.

We now proceed to discuss these questions *seriatim*.

As regards the question of limitation, it has been argued by the learned Pleader for the defendant, Mussamat Imtiaz Jan (who is the sole contesting respondent in this appeal) that the suit was barred by time under article 89 of the Second Schedule of the Limitation Act, 1877. In this connection reliance has been placed on the plaintiff's statement in the Lower Court, dated the 12th December 1905 (p. 33), which runs as follows :—

“ I always called upon Muhammad Rafi to render account
“ but he kept putting off the matter and did not
“ render any account. On coming here (Delhi),
“ I wrote to him letters and he sent replies to those
“ letters. I produce the letters received by me.”

In one of these letters (letter dated the 11th December 1895, marked as Exh. E.), which was produced by the plaintiff, Muhammad Rafi writes to her as follows :—

“ I send currency notes of the value of Rs. 400. These
“ sums are due on account of November.....
“ If God helps I will send accounts towards the
“ end of December.....In future I will send at
“ once any amount that is realized by me.”

With reference to this letter and to the statement of the plaintiff set forth above, the learned Pleader has contended that accounts having been demanded by the plaintiff from Muhammad Rafi from time to time, and Muhammad Rafi having persistently neglected to render accounts after having promised to send accounts by the end of December 1895, the plaintiff's cause of action against Muhammad Rafi accrued on the 1st of January 1896, and that therefore the present suit against the heirs of Muhammad Rafi was being barred by time under the article of the Limitation Act above referred to. In support of this contention two decisions of the Calcutta High Court—*Hari Narain Ghose v. Administrator-General* (1), and *Easin Sarkar v. Barada Kishore* (2) —have been cited. The head note of the first mentioned decision runs as follows :—

“An account of his receipts and disbursements having been
“ demanded from a Mukhtar, he on the 3rd of

(1) (1878) 3 Cal. L. R. 446.

(2) (1909) 11 Cal. L. J. 43.

“ August 1872, wrote a letter in which he promised
 “ to render full accounts during the ensuing vacation.
 “ This he neglected, though he did not refuse to do.
 “ Held, that the limitation for a suit to compel an
 “ adjustment of account ran from the time when the
 “ defendant’s promise to render accounts was broken
 “ and was governed by Act IX of 1871, Schedule II,
 “ article 90 (see Act XV of 1877, Schedule II,
 “ article 89).”

This ruling, so far as it goes, seems to help the defendant’s pleader ; but with every respect to the learned Judges who decided that case, we do not think that the view taken by them is correct. The judgment is a brief one and no reasons whatever are given by the learned Judges in support of their decision. In the body of the judgment they observed :—

“ In this case the Lower Court found that the account
 “ being demanded the defendant at first promised
 “ to render it during the vacation of 1872, that is
 “ in *Assin cr Kartick* 1279, but he never fulfilled
 “ that promise and therefore *virtually* refused to
 “ render the account at that time. The present suit
 “ is brought on the 15th of June 1875 or *Assar* 1282,
 “ and it is accordingly in time.”

According to article 89 of the Limitation Act, 1877, which corresponds to article 90 of Act IX of 1871, in a suit by a principal against his agent for moveable property received by the latter and not accounted for, limitation begins to run from the date when the account is.....demanded and *refused*, or when no such demand is made when the agency terminates. The language of this article, in our opinion, clearly contemplates that apart from the termination of agency, the cause of action must accrue to the principal against his agent on a definite date, and that date must be the date on which the account having been demanded by the principal from the agent is refused by him. The refusal by the agent to comply with the principal’s demand for the account must, in our judgment, be an express refusal on a definite date ; for if the non-fulfilment of a promise on the part of the agent to render account during a particular period or, where no definite period is named, within a reasonable time from the date of the demand, were held to be tantamount to a refusal to render the account at the end of that period or of such reasonable time within the purview of article 89, very many difficulties in the application of that article might conceivably arise. For instance, the agent in answer to a demand by the

principal for an account might promise to render the account without naming a definite period, and on his failing to do so within a reasonable time and on the demand being repeated he might renew the promise from time to time, and yet fail for a considerable period to render the account as promised. If such conduct on the part of the agent is to be deemed to amount to a "virtual refusal," to use the words of the learned Judges of the Calcutta High Court, to render the account within the meaning of article 89 of the Limitation Act, as seems to have been held in the above cited case, and as, in fact, has been contended before us by the defendant's pleader, it would be impossible to fix the terminus *a quo* for the purposes of applying the said article. In our opinion the correct interpretation of the article in question is to hold that the refusal by the agent to render account as mentioned therein must be an express refusal on a definite date and not merely a virtual refusal to be inferred from the omission or the failure on his part to fulfil a promise made by him to render the account to the principal in answer to a demand by the latter. We are not therefore prepared to follow the ruling in *Hari Narain Ghose v. Administrator-General* (1).

The more recent decision of the Calcutta High Court—*Easin Surkar v. Barada Kishore* (2)—on which reliance has been placed by the defendant's pleader while it approves of the ruling discussed above, is not directly in point so far as the alleged applicability of article 89 to the present suit is concerned. In that case the point actually decided was, that when there is a contract between principal and agent to render accounts year by year, article 116 of the Limitation Act applies if the contract is registered, and article 115 if it is unregistered. The Court no doubt held, following the earlier ruling above cited, that the neglect on the part of the agent to comply with the principal's demand to render account was tantamount to a refusal within the meaning of article 89 of the Limitation Act, but this opinion was mere *obiter dictum*, as the learned Judges accepted the argument that article 115 of the Act was applicable to the case before them. But apart from this, the case is clearly distinguishable from the present one, in that there the suit was based upon an express agreement to furnish accounts year by year in pursuance of which a demand to render accounts had been made year by year, and there was a breach of the contract by the agent at the end of each year by reason of his omission to render the accounts as expressly agreed upon. In other words there had been suc-

(1) (1878) 3 Cal. L. R. 446.

(2) (1909) 11 Cal. L. J. 43.

cessive demands by the principal in pursuance of the contract, and successive breaches thereof by the agent at the end of every year, and the principal having brought his suit for accounts within three years of the last breach, it was held within limitation both under article 115 and under article 89 of the Act. In the case before us there was no express contract on the part of Muhammad Rafi to render accounts to the plaintiff at the end of any definite period or year; in his letter to the plaintiff marked as Exhibit E, he simply promised to send accounts to the plaintiff towards the end of December 1895. Surely this bare promise did not amount to a contract between the parties concerned, and his omission to send the accounts as promised by the end of December could not be legitimately construed especially having regard to the natural relationship between them to amount to a refusal to render accounts. In this connection, we may observe in passing that rendition of accounts by an agent means something more than merely sending the accounts or making over account books to the principal; it means and includes submitting and explaining accounts to the principal and paying over to him any balance which might be found due from the agent upon the taking of such accounts. No such rendition of accounts was ever promised by Muhammad Rafi to the plaintiff, and therefore his omission to render accounts in this sense could not have amounted to a refusal to render accounts. We, therefore, think that the plaintiff's cause of action against Muhammad Rafi for rendition of accounts did not accrue at the end of December 1895 and that the present suit is not barred under article 89 of the Limitation Act.

But even if article 89 were held to apply to this case, it clearly could not apply to the plaintiff's suit so as to bar it in respect of the rents and profits of the plaintiff's property, alleged to have been received by Muhammad Rafi after 1895, for there is nothing on the record to show that after that year the plaintiff demanded account on any particular date from Muhammad Rafi and that the latter refused it. Unless the date of the demand followed by a refusal is established, the plaintiff's cause of action against her agent would not accrue under article 89; and in our opinion the plaintiff's indefinite statement that she always called upon Muhammad Rafi to render accounts "but that he kept putting off the matter and did not render any account" (p. 33 of the record), cannot be interpreted as meaning that a specific demand for accounts was made after 1895 and that Muhammad Rafi refused to comply with the demand; article 89 of the Limitation Act, therefore, has no application to

the suit as laid. The article which is really applicable is, in our opinion, article 120, for the plaintiff's suit is one, not against Muhammad Rafi himself, who is dead, but against his heirs, and is for rendition of accounts as regards the receipt by Muhammad Rafi of the rents and profits of the plaintiff's property which was under his control during his lifetime, with a prayer that the amount found due might be directed to be paid out of the estate of Muhammad Rafi in the hands of those heirs. To a suit of this description neither article 62 nor article 83 of the Limitation Act, is applicable; it is governed by article 120, and limitation begins to run from the date of the agent's death, which in the case before us took place on 10th September 1902 (see 96 P. R. 1886, *Seth Chand Mal v. Kalian Mal*) ⁽¹⁾, *Gurudas Pyne v. Ram Narain Sahu* ⁽²⁾, and *Rao Girraj Singh v. Rani Raghubir* ⁽³⁾). For these reasons, we hold that the plaintiff's suit, which was instituted within three years of Muhammad Rafi's death, was within limitation.

(The remainder of the judgment is not required for the purposes of this report.)

Appeal accepted.

No. 2.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

DALO MAL AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

SUNDAR AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 107 of 1910.

Guardian and minor—decree passed on compromise by guardian without compliance of section 462, Civil Procedure Code, 1882—not void, but voidable by suit, if compromise was prejudicial to minor's interests.

Where a guardian *ad litem* for minor defendants had entered into a compromise and the Court, though examining the guardian as to the terms of the compromise, passed no order under section 462, Civil Procedure Code, 1882, and, in execution of the decree passed on the compromise, certain property of the minors was attached and sold—

⁽¹⁾ 96 P. R. 1886.

⁽²⁾ (1884) I. L. R. 10 Cal. 860.

⁽³⁾ (1909) I. L. R. 31 All 429.

Held, that a suit by the minors for recovery of the property sold, on the ground that the decree was bad for want of compliance with the provisions of section 462 was competent

Sadho Missar v. Golab Singh ⁽¹⁾ not followed.

Aman Singh v. Narain Singh ⁽²⁾, distinguished.

Held also, that the decree was not void *ab initio*, but voidable at the instance of the minors, if the equities so required, and the question to determine was whether the compromise effected by the guardian was for the benefit of the minors or not.

3 P. R. 1905 (*Ghulam Ali Shah v. Shahabul Shah*) ⁽³⁾ followed.

Malkarjin v. Narhari ⁽⁴⁾, *Sheik Ismail Rowther v. Rajab Rowther* ⁽⁵⁾, 37 P. R. 1895 (*Hira v. Dina*) ⁽⁶⁾, 17 P. R. 1899 (*Bishen Singh v. Mit Singh*) ⁽⁷⁾, and *Manohar Lal v. Jadunath Singh* ⁽⁸⁾ distinguished.

Further appeal from the order of W. A. LeRossignol, Esquire, I.C.S., Divisional Judge, Amritsar Division, dated the 1st March 1909.

Beechey and Nanak Chand, for appellants.

Rambhaj Datta, for respondents.

The judgment of the Court was delivered by—

CHEVIS, J.—The five sons of Sawan Mal sued Jhanda Singh 9th May 1911. on a bond for Rs. 200, claiming Rs. 200 principal and Rs. 58 interest. Jhanda Singh died while the suit was pending, and his sons (who are the plaintiffs in the present suit) were impleaded in his stead with their mother Mussammat Nihali as guardian *ad litem*. She entered into a compromise, the terms of which were that Rs. 38 was to be remitted, Rs. 12 were shewn as paid in cash and for the remaining Rs. 208 a decree was to be passed, but this sum was to be payable by half-yearly instalments of Rs. 8; costs also were remitted, no interest was to be charged on the decree money, but in default of two successive instalments the whole sum decreed or balance thereof was to be payable at once. The Court examined Mussammat Nihali and a witness as to the terms of the compromise, and then passed a decree in accordance with those terms, but passed no order as required by section 462 of the Civil Procedure Code of 1882 giving sanction to the compromise.

(1) (1897) 3 Cal. W. N. 375.

(2) (1898) I. L. R. 20 All. 98.

(3) 3 P. R. 1905.

(4) (1901) I. L. R. 25 Bom. 337 (P. O.).

(5) (1907) I. L. R. 30 Mad. 295.

(6) 37 P. R. 1895.

(7) 17 P. R. 1899.

(8) (1906) I. L. R. 28 All. 585 (P. C.).

Default occurred and execution proceedings commenced, but again there was a compromise effected by Mussammatt Nihali, the terms of which were that Rs. 15 were to be paid every six months.

Default again occurred, fresh execution proceedings were started, and two houses belonging to the minors were sold and purchased in auction by the decree-holders who afterwards sold them to Mussammatt Tabo, who has since sold one of the houses to Naraina.

The minors now sue for possession of the houses. The first Court held that for want of compliance with the provisions of section 462 the decree must be treated as a nullity and gave the plaintiffs a decree. The learned Divisional Judge commences his judgment by saying that the only point urged before him is whether the compromise was entered into on behalf of the minors with the sanction of the Court, and finding that such sanction had not been given, the Divisional Judge dismissed the appeal.

The defendants appeal to this Court on various grounds. In the memo. of appeal presented to the Divisional Court various grounds also were taken, but only one was argued, and it is now urged that other points should not be listened to in this Court. But if counsel handled the case badly in the Divisional Court, we do not think we should refuse to consider the points urged before us; there are several points which require consideration, and to pass them over would not in our opinion be equitable. We note also that even in this Court the grounds of appeal are not at all as clearly stated as they should be, *e. g.* it is argued before us that the compromise was for the benefit of the minors; this is not definitely alleged in the grounds of appeal, though it certainly is alleged that "the Court erred in holding that the decree under the circumstances was not binding."

Before us it is urged in the first place that the decree cannot be set aside by fresh suit, the only ground on which a suit to set aside a decree will lie being that the decree was obtained by fraud. It is said that plaintiff's proper remedy is by way of appeal or application for review. This, however, would not meet the case for the persons now in possession of the houses were no parties to the suit in which the decree was passed. For the proposition that except in case of fraud a suit does not lie to set aside a decree *Sadho Missar v. Golab Singh* (1) and *Aman*

(1) (1897) 3 Cal. W. N. 375.

Singh v. Narain Singh (1) are cited. The former ruling seems to us to overlook the exceptional case of a suit by minors based on the ground that a compromise effected by their guardian had not been sanctioned by the Court. Such suits have often been brought and decided; in fact *Aman Singh v. Narain Singh* (1) is itself such a case. In the latter case the *quondam* minors failed not only because no fraud was shown, but also because it was not shown that the decree in the previous suit was in any way disadvantageous to the minors. We hold therefore that the present suit is maintainable.

Next it is argued that, even if the decree be held to be not binding on the minors, they cannot now wrest the property from persons who have acquired it in good faith from the auction purchasers, and here *Sheik Ismail Rowther v. Rajab Rowther* (2) is relied on. We should have had to consider this plea had it been raised by Mussaummat Tabo or Naraina, but they have not appealed. The only appellants are the sons of Sawan Mal, and we are of opinion that they, as parties to the former suit, cannot object to the plaintiffs' recovering possession of the property auctioned if it be held that the decree, in execution of which the auction took place, is not binding on the minors.

That sanction of the Court was not given as required by section 462, Civil Procedure Code of 1882, seems clear to us. No such sanction is noted on the record, and there is no oral evidence forthcoming as to such sanction having been given. That the Court examined Mussammatt Nihali as to the terms of the compromise is not sufficient, for this course would ordinarily be followed in order to make sure that the parties fully understood and assented to the terms of the compromise even if Mussammatt Nihali were a party to the suit and not merely a guardian *ad litem*. *Midnapore Zamindari Co. v. Gobinda Mahto* (3) is here cited on behalf of the appellants, but we note that in this case there *was* an order on the record giving permission to compromise the case for the minors. Here there is no such order which makes all the difference.

The Lower Courts have held or assumed that, if the provisions of section 462 were not complied with, the decree was a nullity and incapable of execution. Here we think a mistake has been made. 3. P. R. 1905 (*Ghulam Ali Shah v. Shahabul Shah*) (4)

(1) (1898) I. L. R. 20 All. 98.

(2) (1907) I. L. R. 30 Mad. 295.

(3) (1908) 8 Cal. L. J. 31.

(4) 3 P. R. 1905.

lays down that in such a case the compromise is not void *ab initio*, but voidable at the instance of the minor if the equities of the case so require. In this particular case it was held that though leave of the Court had not been obtained, the compromise being advantageous and for the benefit of the minor and having been acted upon by the parties and *restitutio in integrum* being impossible, the settlement was valid and binding on the parties. *Malkarjun v. Narhari* (1) and *Sheik Ismail Rowther v. Rajab Rowther* (2) are also cited on this point, but these are not cases dealing with want of sanction of Court to a compromise effected on behalf of minors. For the respondents 37 P. R. 1895 (*Hira v. Dina*) (3), 17 P. R. 1899 (*Bishen Singh v. Mit Singh*) (4) and *Manohar Lal v. Jadunath Singh* (5) are cited. The first of these, however, does not deal with the case of a fresh suit brought by persons to set aside a decree passed against them when minors. In the second case it was held that the decree in the former case was not binding on the *quondam* minor because there was a good defence to the suit which his guardian had not set up for him, and so it could not be held that the compromise was for his benefit. In *Manohar Lal v. Jadunath Singh* (5), a Privy Council case, the minor was given a decree declaring that the compromises and decrees passed against him were not binding on him, and that he was remitted to his original rights. This was not, however, a case in which the minor sued for anything more than a declaration; had he sued for return of property, we see no reason to suppose that their Lordships would not have considered whether equity required the return of the property and on what conditions the property should be returned. The judgment too seems to us to assume that the minor had been prejudiced, probably it was not argued that he had not been prejudiced, and so the question whether he had been prejudiced did not arise.

In the present case the question whether the present plaintiffs were prejudiced has not been enquired into. If there was a good defence to the former suit (*e. g.*, if the sum of Rs. 258 sued for was not really due) then no doubt the compromise was not for the benefit of the minors but was clearly prejudicial to them. If however the claim was a just one, to which no good defence could be set up, then it seems to us that Mussammat Nibali did

(1) (1901) I. L. R. 25 Bom. 337 (P. C.).

(2) (1907) I. L. R. 30 Mad. 295.

(3) 37 P. R. 1895.

(4) 17 P. R. 1899.

(5) (1906) I. L. R. 28 All. 585 (P. C.).

the best she could for her children in getting a part of the claim remitted and instalments fixed for the rest, thus obtaining some chance of wiping off the debt by degrees. This is the real point in the case, *viz.*, whether the settlement effected by the mother for the children was for their benefit, and on this point no enquiry has as yet been made. To assume that the decree is a nullity simply because the compromise was effected without sanction, as required by section 462, is wrong; the want of such sanction only renders the decree voidable at the instance of the minors but they can only avoid it in case of its being found that their interests were prejudiced by the compromise.

We accept the appeal, set aside the decision of the Lower Courts and remand the case to the First Court for rededecision after enquiry into the following issue:—

Was the compromise not for the benefit of the minors?

The burden of proving this issue must lie on the plaintiffs, as they are now seeking relief from the Courts and it is for them to shew that in equity they are entitled to relief; moreover, there seems, *prima facie*, no reason to suppose that Mussammat Nihali was in collusion with the former plaintiff or had any reason to admit a claim which was not really due or in any way to act prejudicially to her sons' interests.

Court fee on this appeal will be refunded, other costs in this and in the Divisional Court will be costs in the cause.

Appeal accepted.

No. 3.

*Before Hon. Mr. Justice Rattigan and Hon. Mr.
Justice Chevis.*

BADRI DAS AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

SANTA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 591 of 1910.

Parties—capacity of managing members of Hindu trade business to sue on behalf of the business—limitation—where another member (not a necessary party) was not properly brought on record till after expiry of limitation.

Held, following *Kishen v. Parshad Har Narain Singh* (1), that it is not necessary for all the partners in a Hindu trade business to join in a suit and that it is sufficient if the managing members, with whom the contract was

(1) (1910) 15 Cal. W. N. 321 (P. C.)

made sue to recover damages or compensation for breach of such contract, and that the fact that one of the plaintiffs, the widow of one of the deceased partners (first wrongly described as a minor) was not properly brought on the record until after expiry of the period of limitation could not affect the rights of the managing brothers to sue and the suit was not barred on that account.

Further appeal from the order of H. Scott-Smith, Esquire, Divisional Judge, Ferozepore Division, dated 11th April 1910.

Dawarka Das, for appellants.

Sheo Narain, for respondents.

The judgment of the Court was delivered by—

6th June 1911.

RATTIGAN, J.—One Sandagar Mal had 3 sons—Bihari Lal, Badri Das and Jagan Nath, and the latter carried on an ancestral business under the name of Sandagar Mal-Bihari Lal. Sandagar Mal died some time ago and Behari Lal also died some time prior to the institution of the present suit.

On the 14th January 1909 a suit was instituted in the names of Badri Das, Jagan Nath and Mussammat Jarao (the widow of Bihari Lal) for recovery of the sum of Rs. 1,766-7-6 from defendant.

In the plaint Mussammat Jarao was described as a minor with Badri Das as her next friend.

On the 9th February 1909 defendant objected that Mussammat Jarao was of full age and Badri Das admitted that the objection was correct. Badri Das, thereupon, obtained a power-of-attorney from Mussammat Jarao, and the latter was made a co-plaintiff in her own right on the 19th February 1909. The first Court held that the suit was within time and decreed the claim, but the learned Divisional Judge, upon defendant's appeal, was of opinion that Mussammat Jarao, who was a necessary party to the suit, could not be regarded as a plaintiff until the 19th February 1909 when she was brought on the record as a co-plaintiff in her own right, and that as the suit was barred as regards any claim by her on the latter date, it must be taken to be barred as regards all the co-promisees and proprietors of the firm. He accordingly dismissed the suit *in toto*, but as the case was a hard one for plaintiffs, he left the parties to bear their own costs.

Plaintiffs have preferred a further appeal to this Court.

Since the decision of the case in the Lower Appellate Court their Lordships of the Privy Council have in *Kishen Parshad v.*

Har Narain Singh (1) held that in cases like the present, it is not necessary for all the partners in a trade business to join in a suit, and that it is sufficient if the managing members with whom the contract was made, sue to recover damages or compensation for breach of such contract.

In the present case it is clear from a perusal of plaintiff that the claim is in substance and in fact for recovery of a sum of money due to the firm of Sandagar Mal-Behari Lal upon a balance struck by defendant in favour of Badri Das-Jagan Nath on the 25th January 1903. It is also obvious that plaintiffs were suing to recover the said sum on behalf of the firm and as the balance was struck in their favour, it was not necessary for them to implead as co-plaintiff the widow of their deceased brother, Behari Lal.

Mr. Sheo Narain admits that Mussammat Jarao is, as representative of her husband, a member of the firm, but contends that Badri Das and Jagan Nath were not in express terms suing as managing members for recovery of the present debt. It is true that they do not in express terms so describe themselves, but they were unquestionably suing to recover money on behalf of the firm. Mussammat Jarao, is, in a sense, a member of the firm, but it is highly unlikely that she was regarded as an active member, a fact which appears very clearly from the terms of the very balance upon which this suit is based. As we have pointed out, it is ostensibly in favour of Badri Das and Jagan Nath alone though all parties admit that Mussammat Jarao is entitled to a share in the debt. Mussammat Jarao though interested in the claim, was therefore not a necessary party to the suit inasmuch as the contract, upon which the claim is based (*i. e.*, the balance struck by defendant), was made with Badri Das and Jagan Nath. In the circumstances the ruling of their Lordships to which we have referred is directly in point, and is authority for holding that the suit instituted by Badri Das and Jagan Nath is maintainable despite the non-joinder of Mussammat Jarao, the other member of the firm who, though interested in the result of the suit, had no part in the management of the business and was not one of the partners with whom the contract was made. Even upon the assumption that Mussammat Jarao was no party of the suit when instituted, it follows, therefore, that the claim by Badri Das and Jagan Nath was maintainable and as a result the mere fact that Mussammat Jarao was not properly brought on the record until after the expiry of the period of limitation, cannot

(1) (1910) 15 Cal. W. N. 321 (P. C.)

affect the right of the two managing brothers to sue for recovery of the debt.

Upon this ground alone the decree of the Divisional Judge must be set aside and we need therefore say nothing as to the other points urged before us by Mr. Dwarka Das in support of the appeal (*e. g.*, the effect of order 30, r. 1, C. P. C.) we accordingly accept the appeal and remand the case under order 41, r. 23 to the Divisional Judge for determination of the appeal upon the merits. Court fee to be refunded. Costs to abide the event.

Case remanded.

No. 4.

Before Hon. Mr. Justice Johnstone.

INDAR—(DEFENDANT)—PETITIONER,

Versus

MUSSAMMAT RAO—(PLAINTIFF)—RESPONDENT.

Civil Revision No. 1980 of 1910.

Custom—succession—to land inherited by wife from her father—husband or sister—Riwaj-i-am—Jullundur District.

Held that the entry in the *Riwaj-i-am* of the Jullundur District to the effect that a husband succeeds to his wife's property applies only to the wife's *stridhan* and not to land inherited by the wife in the ordinary way under Punjab Customary Law from a father and that such land in default of male descendants reverts to the father's line, *viz.*, in the present case to deceased's sister.

12 P. R. (F. B.) 1892 (*Sita Ram v. Raja Ram*) (1), referred to.

Petition under section 70 (a) and (b) of Act XVIII of 1884, for revision of the order of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated 30th March 1910.

Kishori Lal, for petitioner.

Sheo Narain, for respondent.

The judgment of the learned Judge was as follows :—

15th June 1911.

JOHNSTONE, J.—The question for decision in this case is whether the heir of the property of Mussammat Banti is her husband, Indar or her sister, Mussammat Rao. The two sisters had a father by name Ralla, and they inherited his property, movable and immovable. In the first instance Banti took possession of the whole but Rao brought a suit and secured half. Now Mussammat Banti is dead and her sister Mussammat Rao sues for possession of Banti's estate. The Courts below have held that she is entitled in preference to the husband.

(1) 12 P.R. (F. B.) 1892.

They have also held that it is immaterial whether in her previous claim for half of the property the present plaintiff omitted certain parcels of the property or not; and also both the Courts have ignored defendant's claim to a sum of Rs. 20 on account of expenditure by him on a house.

The decision regarding the plaintiff's omission to sue in the previous suit for all she might have claimed is obviously correct, for the present claim is based on a different cause of action from that claim. Next as regards the sum of Rs. 20 claimed by the defendant, I think we must take it that the claim for this petty sum was not pressed in either of the Courts below. In any case, there is no material on the file for deciding it, and it would be absurd on the revision side to take the matter up.

The only important question is that of custom. In favour of the defendant is a bare statement in the *Riwaj-i-am* to the effect that a husband succeeds to his wife's property. The evidence of actual positive custom on the record is practically worthless; but Mr. Kishori Lal, for the defendant petitioner, points to paragraphs 270 and 271 of Rattigan's Digest as showing that the general custom in the Punjab is for a husband to succeed to his wife's estate. It will be observed that no authorities are quoted under those sections of the Digest, and further those sections occur in a chapter devoted to the "special" property of "females," *i. e.*, in the case of a Hindu woman to her *stridhan*. But the property in suit in the present case is not *stridhan* at all. It is property inherited in the ordinary way by a person subject to the Punjab Customary Law from a father, and there can be no doubt that the two ladies did not acquire this property as *stridhan* but simply have in it the ordinary interest of a widow or other female under Punjab custom. Those sections therefore have no application to the present case, and it seems to me pretty clear that the *Riwaj-i-am* also refers only to *stridhan*. In Sir William Rattigan's valuable work the section that really throws some light on cases like the present is section 27, Remark 2, where reference is made to No. 12 P. R. 1892, (*Sita Ram v. Raja Ram*) (¹), in which it was laid down that, upon the death without male descendants of a daughter who has inherited property from her father, that property would revert to the father's heirs, *i. e.*, in the present case to Mus-sammat Rao. This seems to me to be a doctrine much more

(¹) 12 P. R. (F. B.) 1892.

in accordance with Punjab custom than the doctrine put forward by Mr. Kishori Lal.

For these reasons I dismiss the revision with costs.

Revision rejected.

No. 5.

Before Hon. Mr. Justice Johnstone.

BHAGAT RAM AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

SIDHU AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 222 of 1911.

Will—definition of—property dedicated to religion—Probate and Administration Act, V of 1881, section 3.

Held, that a document, by which a Hindu dedicated certain houses to the worship of *Sri Thakurji*, declared that he himself would be the manager of the property during his lifetime, and after his death appointed a committee of 3 persons to become manager in his stead, was not a will within the meaning of section 3 of the Probate and Administration Act, 1881.

Chaitanya Gobinda v. Dayal Gobinda ⁽¹⁾, referred to.

In the goods of H. B. Beresford deceased ⁽²⁾ differentiated.

Miscellaneous First appeal from the order of Rai Bahadur Lala Mul Raj, District Judge, Lahore, dated the 17th November 1910.

Rama Nand, for appellants.

Herbert, for respondents.

The judgment of the learned Judge was as follows :—

17th June 1911.

JOHNSTONE, J.—A document registered as a *tamlik-nama* and dated 25th March 1908, was put forward in the Court of the District Judge, Lahore, with an application for probate ; but that Judge, relying on *Chaitanya Gobinda v. Dayal Gobinda* ⁽¹⁾ ruled that the document was not a will and could not be admitted to probate, and thus the application was rejected. Appeal is made to this Court, and the sole question for decision is whether the document is a will or not.

The essential points in the document are :—

- (a) that it dedicates to the worship of *Sri Thakurji* certain houses ;
- (b) that the executant states that he himself will manage the property and arrange for the worship during his lifetime ;

⁽¹⁾ (1905) *I. L. R.* 32 *Cal.* 1082.

⁽²⁾ (1892) 15 *W. R.* 456 (459).

- (c) that after his death a committee of three persons, of whom appellant is one, will become managers in his stead.

Mr. Herbert for respondent-objectors puts forward three reasons for holding the document not a will, namely :—

- (1) that it is on a Rs. 15 stamp, the paper for a true deed under Article 64, Schedule I, Stamp Act 1899 ;
- (2) that it cannot be a will, inasmuch as a will is always revocable by its maker, whereas this *tamluk-nama* is not ;
- (3) that *Chaitanya Gobinda v. Dyal Gobinda* ⁽¹⁾ is good law.

The first two reasons can be easily disposed of.

The executant's opinion as to the legal nature of his deed is not of any importance. It is for the Court to read, analyse and construe the deed and say what it really is. Then, the part of the deed summarised in (c) above was clearly revocable, and thus this test fails. But I am of opinion that the third reason is a good one.

Will is defined in section 3 of Act V of 1881 thus—

“ Will ” means the legal declarations of the intentions of “ the testator *with respect to his property*, which he desires to “ be carried into effect after his death.” The part (c) of the present document satisfies this definition except as regards the words underlined ; for the deed, at the time of its execution, divested the executant of the houses dedicated to religion and left him only with the power of nominating himself as manager *ad interim* and any one he chose as manager after his death. That power, as is explained in the Calcutta ruling is not, “ property ; ” and I do not think that the *dictum* of Norman, C.J. in *In the goods of H. B. Beresford deceased* ⁽²⁾ throws any light on the question. In that ruling, it was merely laid down that property held by a testator as trustee or as a *benamidar* was “ property ” within the meaning of certain provisions of the Court-fees Act.

For these reasons I dismiss this appeal with costs.

Appeal dismissed.

⁽¹⁾ (1905) *I. L. R.* 32 *Cal.* 1082.

⁽²⁾ (1892) 15 *W. R.* 456 (459).

No. 6.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Chevis.

MANSA RAM—(PLAINTIFF)—APPELLANT,

Versus

BEHARI AND OTHERS —(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1197 of 1908.

Limitation—suit for recovery of a share in joint Hindu family property after partition—adverse possession—Indian Limitation Act, Article 144.

Held, that a plaintiff must be able to show that on *his own allegations* his suit is within time and cannot be allowed to adopt this or that useful allegation of the defendant in order to save limitation.

Held also, that where the plaintiff's allegation is that the property of a joint Hindu family has been partitioned on a certain date, one member remaining actually in possession of the whole—the possession of the latter would be adverse to the other member or any one claiming under him from the date of partition and not from date of demand and refusal of share, and that the fact that the latter died shortly after partition and left a widow does not take the case out of the operation of Article 144 of the Limitation Act.

Runjeet Ram Panday v. Goburdhan Ram Panday (1) and *Ramalakshamma v. Ramanna* (2), referred to.

First appeal from the decree of Lala Achhru Ram, B. A., District Judge, Jullundur, dated 20th July 1908.

Lajpat Rai, for appellant.

Fazl-i-Elahi and Shadi Lal, for respondents.

The judgment of the Court was delivered by—

29th July 1911.

JOHNSTONE, J.—Suba Mal had three sons, namely, Nau Nihal, Puran Chand and Sri Ram. Nau Nihal died leaving two sons, defendants 1 and 2, and Puran Chand also left two sons, plaintiff and defendant 3. Sri Ram died childless.

The substance of plaintiff's case, as told by him in his amended plaint at page 62 of the paper book, is as follows: In 1891-1892 by a suit and an award of arbitrators Puran Chand was separated from the other two, and those two, though they did joint business, were no longer a joint Hindu family. On 1st Bhadon, Sambat 1952 (July 1895), Sri Ram and Nau Nihal effected a complete separation and on 1st November 1895 Sri Ram died. His widow Tabo was under Nau Nihal's thumb and so she made over to him all Sri Ram's

(1) (1873) 20 W. R. 25 (P. C.)

(2) (1886) I. L. R. 9 Mad. 482 (P. C.)

property, since which he and his sons have been in possession of it. In May 1898 she got, with the help of Nau Nihal, a certificate for collection of debts due to Sri Ram, whose sons proceeded to recover those debts and to appropriate the money. By inheritance plaintiff would be entitled only to half of Puran Chand's share in Sri Ram's estate, now that Mussammat Tabo is dead—she died in 1902—but his father, by a deed of 9th April 1907, disinherited his other son except as regards share in a certain ancestral house, and thus plaintiff claims one half of Sri Ram's property generally and one-fourth of that house.

Defendants 1 and 2 denied the alleged disruption of the family *qua* Sri Ram and Nau Nihal in 1892; denied the *factum* of complete separation in 1895; denied that Mussammat Tabo made over any property to Nau Nihal, who was already in possession even during Sri Ram's lifetime; asserted that after Sri Ram's death Mussammat Tabo sued Nau Nihal for the husband's property but the suit went by default; alleged that the property in plaintiff's list, was wholly acquired by Nau Nihal, as Sri Ram admitted so long ago as 1882; contended further that, as Sri Ram and Nau Nihal never separated, Puran Chand's family had no right to succeed to a share in Sri Ram's property; and urged finally, that if Sri Ram and Nau Nihal really did partition in 1895, Nau Nihal kept possession of the whole and his possession was adverse and began more than twelve years before suit, which was instituted on 28th October 1907, and so the suit is barred by time.

The learned District Judge framed 9 issues, but did not find occasion to dispose of them all. He held that Sri Ram and Nau Nihal never separated and so plaintiff could not under Hindu Law succeed to a share of the former's property along with the sons of the latter; that Mussammat Tabo's abortive suit bars plaintiff's claim; that Nau Nihal set upon adverse title against Sri Ram in 1882, and so the suit is barred by limitation. There was no decision as to Sri Ram's separate property, which Mr. Shadi Lal admits existed, or regarding the rights of defendant 2.

Plaintiff has filed an appeal here. Leaving out ground 2 which has not been mentioned in argument, and ground 4, which is not very intelligible and is in any case unimportant for our purposes, this appeal traverses each and all of the aforesaid findings of the Lower Appellate Court; and we have heard an elaborate argument by Mr. Lajpat Rai on these points. When Mr. Shadi Lal, however, came to reply on behalf of the defendant-respondent, he preferred to argue first of all the question of limitation, which he approached on a different side from that

taken by the learned Divisional Judge ; and his argument seemed to us to possess so much force and validity that we elected to hear Mr. Lajpat Rai at once in reply before going on to the other points in the case. We have now arrived at conclusions, as the following lines will show, which involve the finding that for the most part the plaintiff's suit is barred by time and that, as regards a minor part of the case, remand for further enquiry and report will be necessary.

Mr. Shadi Lal's point rests upon the proposition that a plaintiff must be able to show that on his *own allegations* his suit is within time, and that, if he cannot do that, he is not permitted to adopt this and that useful allegation of defendants in order to save limitation. Looking at the present case in this way he points out that plaintiff's own assertion is that in 1891 Sri Ram and Nau Nihal by a separation ceased to be a joint Hindu family, though still retaining property jointly, and that in July 1895, more than 12 years before suit, they divided even that property, though no doubt Nau Nihal remained in actual possession of it all as before ; and he contends that Nau Nihal's possession, at least in July 1895, must be taken to have become at once adverse to Sri Ram and so to any one claiming under him, as plaintiff does in the present case. That the above is a fair statement of plaintiff's case is clear on a perusal of paragraph 3 of the amended plaint and paragraphs 2 and 3 of plaintiff's replication (p. 70, Paper Book).

In our opinion this contention has much force, and we do not think anything Mr. Lajpat Rai has been able to bring forward really meets it.

We cannot assent to his argument that, after the final partition of July 1895, the possession of Nau Nihal would not become adverse to Sri Ram until the latter had demanded, and had been refused, possession of his allotted share. *Runjeet Ram Panday v. Goburdhan Ram Panday* (1) and *Ramalakshamna v. Ramanna* (2) are sufficient authority against him, if authority is needed. Nor can we agree with him that, inasmuch as after Sri Ram, his widow Tabo would naturally succeed to a life-estate in his property, therefore article 141, Schedule II, Limitation Act, 1887, applies and gives his client 12 years from Tabo's death in 1902. In our opinion limitation began to run in July 1895, and we can find no authority for the idea that when Sri Ram died a few months later, a new provision of the law of limitation came into

(1) (1873) 20 W. R. 25 (P. C.).

(2) (1886) I. L. R. 9 Mad. 482 (P. C.).

force and article 144 ceased to operate. Most of Mr. Lajpat Rai's remaining remarks on this part of the case have been attempts to bring in statements and allegations of defendants 1 and 2 as refuting the idea of adverse possession by their father and themselves, but the exclusive possession of Nau Nihal as against Sri Ram is quite clear from statements of Sri Ram himself from 1882 downwards and from other documents, *e. g.* his express renunciation in 1882 of all claim to the lands in three named villages; his attestation in 1886 of the mortgage of certain land by Nau Nihal for Rs. 5,000; plaintiff's own statement, made in 1900 (at p. 52, line 32) that *we* had always enjoyed the profits of the property; last answer (on p. 83) of patwari as to possession, proof that defendants 1 and 2 and their father always paid the land revenue (p. 52, line 32, and p. 53, line 25); and evidence of sales by Nau Nihal (*e. g.* patwari, p. 87, question 2). Possession of an exclusive kind, then, is clear; and in gauging the nature and origin of that possession we cannot go behind plaintiff's own allegations. It seems to us that plaintiff can only get over Mr. Shadi Lal's contention, now under consideration, by shewing that Nau Nihal held after July 1895 by permission of Sri Ram, and after Sri Ram's death by that of his widow, but this has not been shown, all that we have to go upon is that when the widow first made a demand upon Nau Nihal it was refused. Lastly Mr. Lajpat Rai's complaint that this matter has been sprung upon him is hardly borne out by the record, for the point was taken plainly at p. 66, para. 9, in defendant's pleas, if not elsewhere.

Mr. Shadi Lal also attacks plaintiff's position as regards limitation in still another way, again meeting plaintiff on his own ground. Plaintiff has asserted, that after the disruption of the joint Hindu family in 1892, Sri Ram and Nau Nihal became partners in a firm—see Mussammat Tabo's plaint drafted by plaintiff (p. 45, line 26) and present plaint (p. 62, para. 2) and plaintiff's statements (p. 53, line 19 and line 26). But firms are, *ipso facto*, dissolved when a partner dies, and so if no partition took place in July 1895, at least disruption of the firm occurred when Sri Ram died in November, and under article 106 the time for a suit was three years from that partner's death.

Mr. Lajpat Rai denies the applicability of article 106 to such a case as the present, and there are difficulties in the way of applying it. We therefore offer no opinion on the matter, as Mr. Shadi Lal's first contention, being allowed, suffices to destroy plaintiff's case except as regards a minor part.

The above discussion applies to the immoveable and moveable property which belonged originally to the joint family. Any claim for that is barred by time. It also applies to any property which Nau Nihal's sons say was acquired by him out of his separate funds, but which plaintiff asserts was joint family property. There remains, however, a third kind of property, *viz.*, that property which Mr. Shadi Lal himself admits before us was acquired by Sri Ram himself by his own exertions. It is apparently admitted that upon Sri Ram's death his widow, Tabo, took possession of that separate property of his. As the District Judge remarks towards the end of his judgment, upon her death plaintiff and the defendants seem to have each taken, of that property, whatever he could get hold of; and the District Judge seems to think that in these circumstances it was not necessary to adjudicate upon the claim for partition, which claim also includes this property.

There is some reason to believe that plaintiff has already got at least his own share of that property, and we therefore put it to Mr. Lajpat Rai whether it was worth while on the part of his client, supposing the rest of his claim was dismissed, to press for the partition of Sri Ram's separate property. After consulting his client, the learned pleader said that he did press for partition, and therefore it becomes necessary for us to remand the case and to request the District Judge to make an inquiry and report as regards this property. The remand is under order XLI, rule 25, Civil Procedure Code, and the return should be made within two months. It is to be understood that by this order we pass a preliminary decree for partition and the enquiry and report should relate to the identity of the property to be divided and the most appropriate division.

Case remanded.

No. 7.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Chevis.

MAHMUD BAKHSH—(PLAINTIFF)—APPELLANT,
Versus

HASSAN BAKHSH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 276 of 1910.

Pre-emption—suit by grandson of vendor, sale having been assented to by his father—Punjab Pre-emption Act, II of 1905, section 12—assent by de facto guardian—presence at sale—waiver—benami pre-emptor.

Plaintiff sued to pre-empt land sold by his grandfather, his father having assented to the sale.

Held, that under section 12, Punjab Pre-emption Act, 1905, each heir has an independent right of pre-emption in order of succession, and that consequently the plaintiff's right, being independent of his father's, was not affected by his father's assent to the sale.

Held also, that even if plaintiff was a minor at the time of sale, the father's assent to the sale would not bind the son, there being nothing to show that the former acted or professed to act on behalf of his son as his *de facto* guardian.

26 P. R. 1911 (pp. 75, 76) (*Sundar v. Salig Ram*) ⁽¹⁾ and 121 P. R. 1889 (*Kadir Bakhsh v. Mussammatt Nur Bibi*) ⁽²⁾ referred to.

Held also, that the mere presence of plaintiff at the time when the bargain was struck does not prove acquiescence in the sale.

Held further, that the Courts are not concerned with the questions where the pre-emptor is raising the money and what he is going to do with the land.

139 P. R. 1894 (*Brij Nath v. Jita*) ⁽³⁾ and 19 P. R. 1898 (*Ramsukh Das v. Fazal-ud-din*) ⁽⁴⁾ referred to.

Appeal from the decree of F. B. R. Spencer, Esquire, District Judge, Multan, dated the 23rd February 1910.

Muhammad Shafi and Harris, for appellant.

Vaughan, for respondents.

The judgment of the Court was delivered by

CHEVIS, J.—The plaintiff in this case claims to pre-empt 3rd August 1911. land sold by his grandfather. The plaintiff is a young man. When the suit was first instituted an objection was taken that he was a minor, but this was over-ruled by the District Judge. The District Judge's ruling on this point was probably correct, it has not been questioned before us. Whether he was a minor at the time of the sale (a year less four days prior to institution of suit) is uncertain.

The vendor's son, Abdul Karim, attested the sale deed. According to the vendees who are the principal defendants in this case, the plaintiff was also present and assented, but as he was then a minor, it was not thought necessary to obtain his signature. According to the plaintiff he was not present at the sale, and never assented; he has been living with his maternal relations ever since the death of his mother. The vendees allege collusion, and say the vendor is financing the plaintiff. The plaintiff alleges that his mother's relatives are supplying him with funds.

⁽¹⁾ 26 P. R. (F. B.) 1911.

⁽²⁾ 121 P. R. 1889.

⁽³⁾ 139 P. R. 1894.

⁽⁴⁾ 19 P. R. 1898.

The District Judge has dismissed the suit, holding that, though the mere fact that the plaintiff's father attested the sale-deed does not debar the plaintiff from suing, the plaintiff is estopped by waiver and is also not entitled to a decree by reason of being a claimant not suing in good faith for his own benefit. The plaintiff appeals.

For the respondents the District Judge's decision is supported on the ground that plaintiff is estopped by his father's assent to the sale. That the father assented to the sale is clearly proved by his signing the sale-deed. But each collateral has an independent right of pre-emption "in order of succession," see section 12 of the Pre-emption Act. The right of the vendor's son is superior therefore to that of the vendor's grandson and would prevail if both son and grandson were figuring as rival pre-emptors, but where the son has put himself out of Court by assenting to the sale, the grandson's right is not destroyed that being an independent right.

The case is different to that of a man contesting an alienation on the ground of want of necessity, in such cases "the *bona fide* " consent of the alienor's son to the alienation would carry weight " with the Court in deciding whether or not the alienation was " for necessity, and as such binding on the alienor's son's son (see as to this the judgment of the F. B. in No. 26 P. R. 1911 at pp. 75, 76, (*Sundar v. Salig Ram*) (1). But here each agnate has by Statute an independent right to claim pre-emption, so that the right of one agnate cannot be extinguished by the mere fact that a nearer agnate has waived his own right. We agree, therefore, with the learned District Judge that the mere fact that the plaintiff's father assented to the sale does not *ipso facto* debar the plaintiff from claiming to pre-empt. Then it is urged for the respondents that the father's assent should be taken to be binding on the son for another reason, *viz.* that the father was guardian of the son. But granting for the sake of argument, that the plaintiff was a minor at the time and that a guardian's acquiescence can bind the ward, we note that there is absolutely nothing on the record of the present case to show that the plaintiff's father was acting on his son's behalf as well as on his own. In 121 P. R. 1889 (*Kadir Baksh v. Mussammat Nur Bibi*) (2) it is laid down that a *de facto* guardian, even after he has by his acquiescence in a sale debared himself from pre-empting, can bring a suit for pre-emption on behalf of his ward, thus it is clear that the

(1) 26 P. R. (F. B.) 1911.

(2) 121 P. R. 1889.

acquiescence of the father cannot bar the son in a case where there is nothing to shew that the father acted or professed to act on behalf of the son. The rights of the guardian and of the ward are as pointed out in 121 P. R. 1889 (*Kadir Bakhsh v. Mussanmat Nur Bibi*) ⁽¹⁾ separate, and the guardian can give up his own personal right of pre-emption without giving up that of the ward. In the present case had the father been professing to act on behalf of the son as well as on his own behalf he could easily have attested the sale-deed signing his name in his own capacity and as guardian of his son.

The next question is, whether the plaintiff himself waived his rights. For the vendees certain witnesses have appeared who say the plaintiff was present when the bargain was struck, but all that they say is that plaintiff kept silence. Now this evidence, even if we accept it, does not prove anything amounting to waiver. A man may be present at the time of sale, but the mere fact that he does not then announce his intention of bringing a suit to pre-empt cannot debar him. He has a whole year in which to make up his mind whether he will assert his pre-emptory rights. If the vendee were at time of sale to ask him if he intended to exercise those rights he might, of course, reply that he waived his rights; in such a case he would of course be estopped. But he would be equally justified in saying that he had not yet made up his mind whether he would assert those rights or not, and that for the present he was content to reserve the option and to refrain from a waiver of right. Where no question is asked and a pre-emptor keeps silence, how can acquiescence be assumed?

The evidence of Ala Bakhsh, son of Ida, as to Mahmud (plaintiff) coming to a well and asking for Mehr Ali, is not very intelligible and sounds to us incredible; so young a member of the family as the plaintiff would not be likely to be sent round to Muhammad Anwar and Mehr Ali who would be for more likely to deal direct with the vendor. The evidence of the *Sunyara*, Muhammad Bakhsh, as to plaintiff calling him and saying his father wanted him, is directed to show that plaintiff was present at registration and was assisting by calling in a *Sunar* to test the money. This evidence, too, we regard as very doubtful. Muhammad Bakhsh is the only witness who mentions this matter of testing the money and we cannot rely on him. We hold, therefore, that the defendants have failed to prove that the plaintiff himself waived his rights.

(1) 121 P. R. 1889.

Then it is urged for the vendees, that the plaintiff has no money of his own, and is merely a *benami* pre-emptor and in this connection 139 P. R. 1894 (*Frij Nath v. Jita*) ⁽¹⁾ and 19 P. R. 1898 (*Ramsukh Das v. Fazl-ud-din*) ⁽²⁾ are quoted. In the former ruling we find that one learned Judge (Bullock, J.) expressed the opinion that, if it could be shewn that the suit was not brought *bonâ fide* for the benefit of the plaintiff, the suit must fail, but this opinion was not shared by the other learned Judge (Benton, J.) who wrote: "A *benami* pre-emptor "is, to my mind, an inadmissible notion; we are not concerned "with what the plaintiff may do with the land after he has "got it." Mr. J. Benton went on also to deal with the question of plaintiff being unable to find the purchase money, and disposed of it by saying "his payment of the money is a very "sufficient answer to the objection." We note that as Mr. J. Bullock found in the end that it was not proved that plaintiff was not suing for his own benefit, his remarks as to the necessity of *bonâ fides* on the part of a pre-emptor are *obiter dicta*.

In 19 P. R. 1898 (*Ramsukh Das v. Fazal-ud-din*) ⁽²⁾ the head note is misleading. All that is said in the body of judgment is "now there *may be* authority for holding that when "it is proved that a plaintiff in a pre-emption suit is acting "*benami*, that is that another person will on the plea that he "is the real purchaser be entitled to take from plaintiff whatever "may be decreed him, the Court should refuse the nominal "plaintiff a decree." This merely says there may be authority, not that there is authority; the question whether a *benami* pre-emptor is entitled to get a decree was not the real point for decision in that case.

The later rulings are all to the effect that the Courts are not concerned with the questions, where the pre-emptor is raising the money and what he is going to do with the land and this is our own opinion. A man who has a right to pre-empt has merely to produce the money just as any other purchaser; he can no more be asked "what are you going to do with the land," or "where did you raise the money," than any purchaser in a shop could be asked such questions by the shop-keeper. The pre-emptor has nothing to do but to prove his right to take over the bargain and when he has proved this right all that he has left to do is to produce the money within the time fixed by the Court.

⁽¹⁾ 139 P. R. 1894.

⁽²⁾ 19 P. R. 1898.

If in any such case the pre-emptor is buying the property for an outsider, and if after securing the property, he transfers it to the latter, it may be open to another pre-emptor to challenge the second transfer and to claim pre-emption in respect thereof. This right is, in our opinion, a sufficient safeguard against *benami* transactions of the kind.

We note, too, that in our opinion the oral evidence produced by plaintiff in this case, to shew that he has long been living with his maternal relations and that it is they who are financing him, seems to us as good as the oral evidence produced by the vendees.

The plaintiff is, in our opinion, entitled to a decree. The amount of money to be paid was settled between the parties in the District Judge's Court, see page 11 of the Paper-book.

We accept the appeal and, reversing the decision of the District Judge dismissing the suit, we give the plaintiff a decree for possession by pre-emption of the land in suit, on condition of payment into Court by 1st October 1911 of the sum of Rs. 6,020 less costs of plaintiff in both Courts (any sum already paid in, to count as paid towards the above sum). In default of payment, as above directed, by 1st October 1911, the suit will stand as dismissed with costs in both Courts.

Appeal accepted.

No. 8.

Before Hon. Mr. Justice Rattigan.

SINGER MANUFACTURING COMPANY, DELHI—

(PLAINTIFF)—PETITIONER

Versus

YAR MUHAMMAD KHAN AND ANOTHER—(DEFENDANTS)
—RESPONDENTS.

Civil Revision No. 328 of 1910.

Civil Procedure Code, Act V of 1908, Order 6, rule 14, and Order 29, rule 1—suit by Foreign Company through its Agent in India.

The plaintiff Company was incorporated in the United States, America, the plaint was signed and verified by their Agent at Delhi, who had been appointed by and held a power-of-attorney from the Company's General Attorney and Agent in British India.

Held, that both under the power-of-attorney and also as a "principal officer" of the Company, the Delhi Agent was authorised to sign and verify the plaint under Order 6, rule 14, and Order 29, rule 1 of the Civil Procedure Code, respectively.

Singer Manufacturing Company v. Baij Nath (1) referred to.

Petition under section 25 of Act IX of 1887, for revision of the order of Khwaja Tasaddug Husain, B.A., Judge, Small Cause Court, Delhi, dated the 16th November 1909.

Beran Petman and Obedulla, for petitioner.

Abdul Kadir, for respondents.

The judgment of the learned Judge was as follows :—

18th April 1911.

RATTIGAN, J.—In this case the Judge of the Small Cause Court, Delhi, has rejected the plaint on the ground that it is not duly signed and verified. The plaintiff is the Singer Manufacturing Company, a Company which appears to have been incorporated in the United States, America, and which carries on an extensive business in respect of the sale of sewing machines in various parts of this country. The present plaint has been signed and verified on behalf of the said Company by one Macaddum who has been appointed agent for the Company at Delhi by a Mr. Patell who, in his turn, holds a general power-of-attorney from the Company's accredited English agents authorizing him to act for the Company as their general attorney and agent in British India, and to appoint sub-agents therein. It is not denied that Mr. Macaddum has special knowledge of the facts relating to the present claim and that he holds a general power-of-attorney from Mr. Patell for the Delhi District, but it is urged that his signature to the plaint is not sufficient for the purposes of Order 6, rule 14, of the Civil Procedure Code. I do not think there is any force in this argument. The plaintiff Company is "absent" and Mr. Macaddum is, in my opinion, duly authorized by the power-of-attorney, which he holds, to sign the plaint. As the agent of the Delhi branch moreover, he is a "principal officer" of the Company within the meaning of Order 29, rule 1 of the Code, and competent, as such, to sign and verify the plaint. In this connection, I might add that I see no reason to differ from the decision of the High Court of Calcutta in *Singer Manufacturing Company v. Baij Nath* (1) to the effect that there is nothing in this rule to exclude from its operation a foreign Company which is not incorporated as such in this country. I also find that in Civil Revision No. 28 of 1898 (unreported) the Allahabad High Court held that a plaint which had been signed by an agent of this very Company in circumstances similar to those of the present case, had been duly signed for the purposes of section 51 of the Civil Procedure Code of 1882. The Judge of the Small Cause Court in rejecting the plaint as not duly signed relies upon No. 107 P. R.

(1) (1902) I. L. R. 30 Cal. 103.

1907 (*Niharku v. Madho*) (1), but as that case is in no way in point I can only surmise that he has given a wrong reference. I have, however, consulted the authorities, and I cannot find any ruling of this Court which supports his conclusions. I accordingly accept this petition and setting aside the order of the Lower Court, I direct that the record be returned to it with orders to accept the plaint and proceed with the hearing of the case. Costs to abide the event.

The delay in disposing of this petition has been due to the fact that Mr. Abul Kadir, who appeared for respondent No. 2 alone was erroneously supposed by the officers of this Court to be counsel for both respondents, with the result that notice was not issued to respondent No. 1. The latter has now received notice, but has put in no appearance and this order is consequently *ex parte* against him.

Case remanded.

No. 9.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ACHHAR SINGH AND OTHERS—(PLAINTIFFS)—
PETITIONERS

Versus

BADHAWA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 2067 of 1910.

Village shamilat—set aside for a road—obstruction of—suit by some of the proprietary body—special damage.

Held that in a suit by some of the proprietary body, to restore the use as a road of land set aside in partition of the village *shamilat* for the purpose of a road, it is not necessary for the plaintiffs to prove special damage to themselves, apart from the damage caused to the public, as a condition precedent to obtaining a decree.

73 P. R. 1882 (*Ghan Singh v. Sadda Singh*) (2), 74 P. R. 1885 (*Chuhar Singh v. Dhaunkal Singh*) (3) and 4 P. R. 1895 (*Chajju Mal v. Ganda Mal*) (4) referred to.

Petition under section 70 (a) and (b) of Act XVIII of 1884, for revision of the order of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated the 12th January 1910.

Hukam Chand, for petitioners.

Sheo Narain, for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The findings on remand are that the whole of the village *shamilat*, with the exception of the village

29th April 1911.

(1) 107 P. R. 1907.

(2) 73 P. R. 1882.

(3) 74 P. R. 1885.

(4) 4 P. R. 1895.

site, roads, tanks, &c., and one *kunal* 8 *marlas* of *banjar kadim*, has been partitioned, and that the road in dispute is described as a "public road," admittedly a thoroughfare from one village to another excluded from partition, and impartible because its application to any purpose other than a road would stop inter-village communication.

These findings have not been objected to. On the findings 73 *P. R.* 1882 (*Ghan Singh v. Sadda Singh*) (1) and 74 *P. R.* 1885 (*Chuhar Singh v. Dhaukal Singh*) (2) are authority for holding that it was unnecessary for the plaintiffs to prove special damage to themselves, as compared to the rest of the public, as a condition precedent to obtaining a decree.

The road was part of the village *shamilat* and was devoted to the purpose of a road. Some of the proprietary body could, therefore, sue for its restoration to use as a road, 4 *P. R.* 1895 (*Chajju Mal v. Ganda Mal*) (3) is not applicable, the lane in suit there being a public street in possession of a Municipal Committee. Notice was issued under section 70 (1) (a) with a view to the trial of the appeal, but the remand obviated the necessity for this course and the case was dealt with under section 70 (1) (b).

Under that sub-section and Order 41, rule 23, I set aside the decree of the Lower Appellate Court and remand the appeal for decision of the other points involved. Court fee on the memorandum of appeal will be refunded and other costs will be costs in the cause.

Revision accepted.

No. 10.

Before Hon. Mr. Justice Rattigan.

SAHIB DIAL—(PLAINTIFF)—PETITIONER

Versus

LAJPAT RAI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 902 of 1910.

Specific Relief Act, I of 1877, section 42, proviso—not applicable to suit under section 283, Civil Procedure Code, 1882.

Held that the *proviso* to section 42 of the Specific Relief Act has no application to suits instituted under the provisions of section 283 of the Civil Procedure Code, 1882.

(1) 73 *P. R.* 1882.

(3) 4 *R. R.* 1895.

(2) 74 *P. R.* 1885.

Kristnam Sooraya v. Pathma Bee (1), *Ambu v. Kettilamma* (2) and 51 P. R. 1897 at p. 228 (*Sardar Dial Singh v. Beli Ram*) (3) followed.

Kunhiamma v. Kunhunni (4) distinguished.

Petition for revision under section 70 (b) of Act XVIII of 1899, of the order of M. L. Waring, Esquire, Additional Divisional Judge, Amritsar, at Jullundur, dated 23rd December 1908.

Gopal Chand, for petitioner.

Abdul Kadir, for respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—This was a suit under section 283, Civil Procedure Code of 1882, and in it the plaintiff, whose objections had been disallowed in execution proceedings, prayed for a declaration that a certain house could only be attached and sold subject to the mortgage held by him. 20th April 1911.

The Divisional Judge on appeal by defendant, dismissed plaintiff's suit on the ground that "as under the terms of the mortgage, plaintiff was entitled to possession, a declaratory suit does not lie"; (section 42, Specific Relief Act, 1877). This point was not raised in the Court of first instance and Mr. Gopal Chand asserts that in point of fact his client, the plaintiff, is in actual possession of the house through his tenant, defendant No. 2. But even if this is not the case, the weight of authority is decidedly in favor of the proposition that the *proviso* to section 42 of the Specific Relief Act has no application to suits instituted under the provisions of section 283 of the former Civil Procedure Code, *Kristnam Sooraya v. Pathma Bee* (1), *Ambu v. Kettilamma* (2); the ruling in *Kunhiamma v. Kunhunni* (4) *contra*, was held by the Full Bench to be erroneous; see also the remarks in 51 P. R. 1897 (F. B.) at p. 228 (*Sardar Dial Singh v. Beli Ram*) (3).

I accordingly accept the petition and setting aside the decree of the Divisional Judge, I remand the case to him (under Order 41, rule 23) for determination of the appeal upon the merits.

Costs to abide the event.

Case remanded.

(1) (1905) I. L. R. 29 Mad. 151 (F. B.).

(2) (1890) I. L. R. 14 Mad. 23.

(3) 51 P. R. 1897 (F. B.).

(4) (1892) I. L. R. 16 Mad. 140.

No. 11.

*Before Hon. Mr. Justice Rattigan.*DUNI CHAND AND OTHERS—(DEFENDANTS)—
APPELLANTS*Versus*AZIZ KHAN AND OTHERS—(PLAINTIFFS)—RE-
SPONDENTS.

Civil Appeal No. 773 of 1910.

Civil Procedure Code, 1908, Order 41, rule 22 (4)—determination of cross-objection on dismissal of appeal, other than on the merits.

Held that, except in the case of the original appeal being “withdrawn or dismissed in default” as expressly provided for in Order 41, rule 22 (4) of the Civil Procedure Code, 1908, the general rule that cross-objections cannot be entertained unless the appeal is decided on the merits is still in force.

Ramjiwan Mal v. Chand Mal (1) referred to.

Held also, that an appellant who has filed his appeal on an insufficient Court-fee stamp may be allowed to amend his memo. of appeal by striking out part of his claim, on the insufficiency being pointed out to him by the Court.

Ram Prasad v. Bhiman (2) and *Arogya Udayan v. Appachi Rowthan* (3), referred to.

Further appeal from the order of E. A. Estcourt, Esquire, Divisional Judge, Attock, at Campbellpore, dated the 12th April 1910.

Sukh Dial, for appellants.

Abdul Kadir, for respondents.

The judgment of the learned Judge was as follows :—

25th April 1911.

RATTIGAN, J.—The judgment of the first Court is far from clear, but it appears that the plaintiffs sued to redeem certain property which had been mortgaged in 1878 for Rs. 400 on payment of that amount. They paid Rs. 30 as court-fee on this claim.

Defendants claimed that there was in addition to the said mortgage, a further charge of Rs. 550 created in 1881 upon the land, and that the total sum which the plaintiffs had to pay before they could redeem was Rs. 950 as principal and Rs. 1,15,921-11-3 as interest and compound interest. The District Judge granted plaintiffs a decree for redemption conditional on the payment of Rs. 950 principal and Rs. 3,351-9-7, simple interest, for twenty-four years and four-and-a-half months at the agreed rate of Rs. 2-1-4 *per cent. per mensem*.

(1) (1888) *I. L. R.* 10 *All.* 587.(2) (1901) *I. L. R.* 27 *All.* 151.(3) (1901) *I. L. R.* 25 *Mad.* 513.

Plaintiffs were ordered to pay the full amount of court-fee on the amount so held to be due from them.

From this decree the defendants preferred an appeal to the Divisional Judge and urged that the full amount of interest and compound interest should have been made payable by the plaintiffs, but for some unexplained reason their memorandum of appeal, which was obviously intended to secure them a further payment of over a lakh of rupees, was stamped with a court-fee stamp of Rs. 10 only. Defendants filed certain cross-objections to the effect that the mortgage-deed of 1881 was not enforceable, that the Court of first instance should not have allowed any interest to the defendants, and that the fact that defendants had been enjoying the use and occupation of the land for many years had been completely overlooked.

The Divisional Judge very rightly held that the memorandum of appeal filed by the defendant-appellants was insufficiently stamped, and that as they prayed, that the plaintiffs should be made to pay the full amount of interest and compound interest claimed by them, court-fee duty must be paid on that amount. He accordingly directed, by order, dated 5th April 1910, that the appellants should pay Rs. 2,990 further duty, and at the request of the defendants adjourned the case to the 12th April 1910.

On the said date the appellants presented a petition to the Divisional Judge to the effect that though they were entitled to the full sum claimed by them as interest and compound interest, they could not afford to pay stamp duty on so large a sum. They accordingly prayed that the memorandum of appeal might be returned to them for amendment. The Divisional Judge refused this prayer on the ground that as the appellants had "distinctly claimed the whole amount of compound interest," they could not "at this late stage" ask to have part of this prayer cut out. As the full stamp duty had not been paid, the learned Judge dismissed the appeal with costs. In this order he also held that the respondents' cross-objections could not be heard and were dismissed on the merits for reasons given. I confess I am not able to follow the learned Judge's remarks with regard to the cross-objections. If owing to the dismissal of the appeal, the cross-objections could not be heard, dismissal obviously cannot be said to have been "on the merits," for the Divisional Judge had no power to reject them on the merits without hearing the respondents. But though the learned Judge in this order says that the cross-objections could not be heard, it is clear from his

subsequent order (of the same date) that respondents were in fact heard in support of their cross-objections, and that it was only after hearing arguments in support of them, that the Divisional Judge eventually dismissed them. I am of opinion that the learned Judge had no jurisdiction to entertain and determine those cross-objections after he had dismissed the appeal. The ordinary rule is that cross-objections cannot be entertained unless the appeal is decided on the merits (*Ram Jivan Mal v. Chand Mal*) (1) and until the enactment of the present Code of Civil Procedure, it was a fairly well established proposition that cross-objections failed if an appeal was withdrawn or dismissed in default. Clause (4) of Order 41, rule 22, now provides that where the original appeal is withdrawn or dismissed in default, cross-objections may nevertheless be heard and determined. But this exception to the general rule is expressly limited to the two cases specified, and does not affect the applicability of the general rule in other cases. In the present case the appeal was dismissed without a hearing, upon the ground that the appellants had not paid the court-fee duty, and in the circumstances, as the appeal had been dismissed, the Divisional Judge acted *ultra vires* in proceeding thereafter to hear and determine the cross-objections.

To return, however, to the main question before me. The defendants-appellants have appealed to this Court from the decree of the Divisional Judge dismissing their appeal, and in support of their appeal, Mr. Sukh Dial urges that it was open to them when they found that they could not afford to pay the full court-fee duty to ask the Court to return the memorandum of appeal, so that they might amend it by abandoning part of their claim and paying such duty as might be leviable upon the amount for which they eventually decided to ask for a decree. There is a dearth of authority upon the question before me, but after full consideration, I think that in justice and upon principle an appellant's prayer of this kind should be allowed. He urges that he is really entitled to claim a large sum, but when he finds that he must pay a heavy duty on his memorandum of appeal if his claim as a whole is to be considered, I am unable to find any just and reasonable ground for refusing him liberty to abandon part of his claim and to restrict it to such amount only as he can afford to pay duty upon. A plaintiff who is similarly situated has been held entitled to claim this right at the initial stage of a suit (*Ram Prasad v. Bhiman*) (2).

(1) (1888) *I. L. R.* 10 *All.* 587. (2) (1904) *I. L. R.* 27 *All.* 151.

The same principle should surely apply to the case of a defendant who appeals from a decree passed against him, and at the very outset of the proceedings asks to be allowed to amend his memorandum of appeal by striking out part of his claim. This prayer was made for no ulterior purpose or with the intention of affecting the jurisdiction of the Court (*Arogya Udayan v. Appachi Rowthan*) (1), and in equity and justice, I think, it should have been acceded to. I cannot see that the respondents are in any way prejudiced thereby, or that an order allowing such amendment would be detrimental to the revenue. The Divisional Judge refused the prayer apparently on the ground that it had been preferred at "a late stage." I cannot understand this remark. The request was made at the earliest possible opportunity and as soon as the Divisional Judge had pointed out that the memorandum of appeal was insufficiently stamped. I accordingly accept the appeal and direct that the memorandum of appeal presented to the Divisional Judge be returned by him to the appellants for such amendment as they may deem fit in respect of the amount claimed by them. The memorandum of appeal must thereafter be duly filed in the Court of the Divisional Judge with a proper court-fee, within such time as the learned Judge may fix for that purpose. As regards plaintiff's petition for revision, in respect of the order of the Lower Appellate Court rejecting their cross-objections, I hold that the Divisional Judge acted *ultra vires* in determining those cross-objections after he had dismissed defendants' appeal, and I therefore accept the petition in question and set aside the order of the Divisional Judge. If defendants file an amended memorandum of appeal duly stamped within the time specified, I direct that the Divisional Judge shall, at the hearing of the said appeal, hear and determine plaintiff's cross-objections as well. If no such appeal is filed within the time specified, the said cross-objections will stand dismissed, as falling with the dismissal of the appeal, if in the event specified the Divisional Judge decides to dismiss the appeal. Costs both in the Lower Appellate Court and in this Court will abide the event.

Appeal accepted.

(1) (1901) I. L. R. 25 Mad. 543.

No. 12.

Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon. Mr. Justice Johnstone.

HAMID ULLAH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MUSSAMMAT SAHIBJI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1119 of 1908.

Custom—alienation—of land in lieu of dower—Pathans—Rawalpindi District—Riwaj-i-am, question 46—dower—amount of—

Held, that the answer to question 46 recorded in the *Riwaj-i-am* of the Rawalpindi District must be held to mean that a Pathan can give to his wife in payment of her dower a part of his land *more or less equal in value* to that dower, as promised or fixed.

Held also, that when it is not proved, that any sum was fixed as dower, the *sharai* dower must be presumed.

Further appeal from the order of T. P. Kennedy, Esquire, Divisional Judge, Rawalpindi Division, dated 11th August 1908.

Gobind Das, for appellants.

Miran Bakhsh, for respondents.

The judgment of the Court was delivered by—

17th May 1911.

JOHNSTONE, J.—This has been instituted and admitted as an ordinary further appeal, the value being stated as Rs. 1,000 and the Lower Appellate Court having reversed the decision of the first Court. We find, however, that the value of the land in suit according to the 30 times *jama* rule is some Rs. 160 only, and therefore, though there is a house also in suit whereof we do not know the value, we cannot allow that plaintiffs have established their right to file such an appeal as this.

The matter is not, however, of great practical importance as it turns out, for plaintiffs have a good case for revision under section 70 (1) (b), Punjab Courts Act.

The first Court found that plaintiffs were reversioners of Khan Zaman, deceased, who shortly before his death sold by registered deed some $9\frac{1}{2}$ *bigahs* of land to his wife Sahibji, defendant No. 1, for Rs. 1,000, stated to be the amount of her dower still due to her, and who also on the same day gifted by deed all the rest of his land, some 67 *kanals*, to his daughters. That Court also held that the property was ancestral, and that defendant No. 1 has not proved that at the time any dower was due to her; and so it gave plaintiffs the decree prayed for.

The learned Divisional Judge reversed this decree and dismissed the suit. He held that there is no proof that Rs. 1,000 was fixed at marriage as dower, but added that it was not disputed that *some* dower was due. Then he went on to hold that among these Pathans by custom a husband can give part of his landed property to his wife as dower—this proposition being based on question 46, Robertson's Customary Law for Rawalpindi District, and upon the supposition that Khan Zaman had an ample estate. Finally, holding that the "dower" was a just debt and custom being as stated, he accepted the appeal.

In our opinion this is not the proper way to look at the case. We begin with the finding that it is not proved that Rs. 1,000 was fixed as dower; indeed, it is not proved that *any* sum was fixed as dower. Therefore the presumption is that *sharai* dower, which we understand to be about Rs. 26-8-0 was the dower for Mussammat Sahibji. Next, the custom relied upon by the Divisional Judge is very broadly stated, and is not supported by witnesses. We cannot take Mr. Robertson's *dictum* in question 46 to mean that a Pathan can, regardless of what was promised at marriage as dower, give what he likes to his wife out of the landed property, at most we can only take him to mean that a Pathan can give his wife in payment of her dower a part of his land more or less equal in value to that dower as promised or fixed.

The result is that plaintiffs' appeal is allowed and they will have a decree as prayed subject to the condition that the sum of Rs. 26-8-0 shall be a charge upon the land in suit in favour of defendants Mussammat Sahibji and her own heirs or assigns.

Parties to bear their own costs.

Appeal accepted.

No. 13.

Before Hon. Mr. Justice Rattigan.

ALI MUHAMMAD AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

SURAJ-UD-DIN—(PLAINTIFF)—AND IMAM DIN—
(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 527 of 1911.

Custom (alienation)—Muhammadian Jats, Lahore tahsil—gift by female in possession—locus standi of son of the sister of last male holder's father to contest the gift—status of female heirs to challenge alienations—Riwaj-i-am.

Held that unless the custom of the tribe recognised a female and her issue as heirs, the right of controlling alienations even by a female does not extend beyond the line of agnatic heirs.

19 P. R. 1906 (*Chiragh Bibi v. Hassan*) (1), 61 P. R. 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*) (2), 93 P. R. 1906 (*Natha Singh v. Mohan Singh*) (3), 135 P. R. 1908 (*Magsud-ul-Nisa v. Kaniz Zohra*) (4), (1900) P. L. R. Vol. I., p. 301—302 (*Makhan v. Mussammat Lali*) (5), referred to.

63 P. R. 1908 (*Waryaman v. Hira Nand*) (6), differentiated.

Held also, that by the customary law of the Lahore District among Jats a daughter and a sister have no right of inheritance and *a fortiori* the son of the sister of the last male holder's father, and the latter is consequently not competent to challenge a gift made by the mother of the last male holder then in possession.

134 P. R. 1907 (F. B.) (*Hamira v. Ram Singh*) (7), and 120 P. W. R. 1909 (*Mussammat Nasib-ul-Nissa v. Mansur Ali*) (8), referred to.

Further appeal from the order of Major A. A. Irvine, Divisional Judge, Lahore, dated the 25th October 1909.

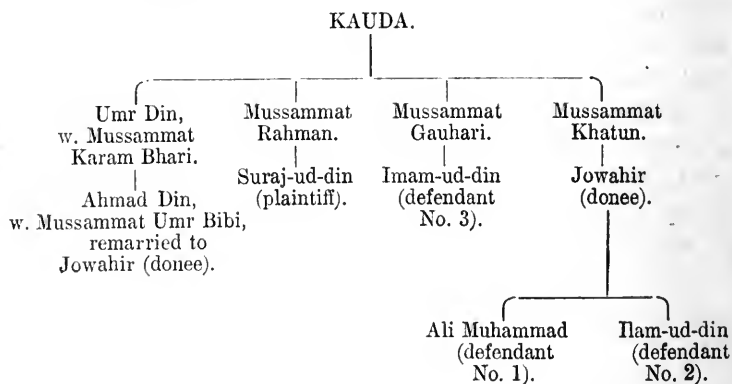
Muhammad Shafi, for appellants.

Suraj-ud-Din, respondent, in person.

The judgment of the learned Judge was as follows :—

25th April 1911.

RATTIGAN, J.—The parties are Muhammadan Jats of *mouza* Momanpura in the Lahore *tahsil* and the following table will show their relationship :—



Umr Din succeeded to the property of his father Kauda and on Umr Din's death, the property devolved upon Ahmad Din, who died without issue in 1896. Ahmad Din left a widow Mussammat Umr Bibi, but as she remarried, the property went to Mussammat Karm Bhari, the mother of Ahmad Din and widow of Umr Din, and mutation in her favour was duly sanctioned on the 13th January 1897. In November 1898

(1) 19 P. R. 1906.

(2) 61 P. R. 1906.

(3) 93 P. R. 1906.

(4) 135 P. R. 1908.

(5) (1900) P. L. R. Vol. I, pp. 301—302.

(6) 63 P. R. 1908.

(7) 134 P. R. 1907 (F. B.).

(8) 120 P. W. R. 1909.

Mussammat Karm Bhari made an oral gift of the property to Jowahir (who had married her son's widow) and on the 15th December 1898 mutation was effected in favour of the donee who thereafter remained in possession of the property. Mussammat Karm Bhari died in February 1907, and in April 1907, plaintiff Suraj-ud-din instituted the present suit claiming possession of one-third of the property on the ground that he is one of the grandsons of Kauda; and as such entitled to succeed to that portion of the property inherited from Kauda it is admitted that there is no agnatic heir. The Lower Courts have concurred in granting plaintiff a decree for possession of his alleged one-third share in the property and the defendants have applied to this Court under clause (b) of section. 70 (1) of the Punjab Courts Act for revision of those orders.

Mr. Muhammad Shafi has argued the case on behalf of the defendants but Mr. Ganga Ram, who had been engaged on behalf of the plaintiff, did not appear until a later hour in the day and after the hearing of the case was concluded, as he was engaged in another case in one of the Subordinate Courts. His client the plaintiff was present but said that he had nothing to urge in support of the judgments of the Lower Court except to say that they were correct. In my opinion, formed after a careful consideration of the points involved, the plaintiff has no *locus standi*. It seems to me that the learned Divisional Judge in upholding plaintiff's claim on the ground that the donee, Jowahir "was no more and no less an heir than plaintiff-respondent and "that Mussammat Karm Bhari had no right to gift away the "whole property to Jowahir who stood in exactly the same "relationship to Kauda as does the plaintiff," has assumed that Jowahir and plaintiff are both heirs to the property in the absence of agnates, and has, moreover, overlooked the fact that even if the plaintiff is by the custom of the tribe to which the parties belong, a prospective heir with some sort of right, it does not follow that he is, as such prospective heir, entitled to contest an alienation made by Mussammat Karm Bhari and to oust the donee who is in possession.

Upon the true view of the facts, plaintiff can claim to succeed to Mussammat Karm Bhari, only as the son of the paternal aunt of the last male-holder (Ahmad Din), and I know of no case in which it has been held that such a person is by custom entitled to challenge an alienation made by the person for the time being in possession, even though such a person is a female.

134 P. R. 1907 (F. B.) (Hamira v. Ram Singh) (1), and 120 P. W. R. 1909 (Mussammat Nasib-ul-Nissa v. Mansur Ali) (2).

According to the Customary Law of the Lahore District (p. 10), among Jats a daughter and a sister have no rights of inheritance, and *à fortiori* the son of the sister of the last male-holder's father would have no such right. Indeed, it is rare to find that custom allows a female or a female's descendants to contest alienations made by the person, whether male or female, in possession of the property. As remarked by the learned Judges in No. 135 P. R. 1908 (*Magsud-ul-nisa v. Kaniz Zohra*) (1), "when a female with a right to succeed to the estate held by another female, seeks to control an alienation by the latter, she must first prove two things, (1) that she is in fact entitled to succeed on the death of the alienor; (2) that the alienor is holding as a female with only a limited estate resembling that of a widow. When a female is holding an estate on the same tenure as a male proprietor or male sonless proprietor, another female is not competent to contest her alienations."

Among certain tribes (*e. g. Arains*) daughters are recognized as heirs in the absence of male lineal descendants, and the custom of such tribes recognizes the rights of such females to contest alienations, No. 19 P. R. 1906 (*Chiragh Bibi v. Hassan*) (2). But unless the custom of the tribe recognizes a female and her issue as heirs, the right of controlling alienations, even by a female, does not extend beyond the line of agnatic heirs, No. 61 P. R. 1906 (*Nur-ul-nisa v. Gauhar-ul-nisa*) (3), No. 93 P. R. 1906 (*Natha Singh v. Mohan Singh*) (4) and *Makhan v. Mussammât Lali* (5). In the present case as plaintiff has not been able to show that by custom he, as the son of the last male-holder's paternal aunt, is in the line of heirs, and is entitled as such to challenge the gift made by Mussammât Karm Bhari, it follows that he cannot claim to oust a person who is in possession of the property by virtue of such gift. The very fact that plaintiff and defendant No. 2 (who has as much right to the property as plaintiff) made no attempt during Mussammât Karm Bhari's lifetime to avoid the gift made by her to Jowahir, tends to show that they well knew that by custom they had no right to challenge the alienation, and the result has been that for some 9 years the donee has been allowed to remain in undisturbed possession of the property.

The argument, that the donee is in no better position as an heir than the plaintiff, is fallacious.

(1) 35 P. R. 1908.

(2) 19 P. R. 1906.

(3) 61 P. R. 1906.

(4) 93 P. R. 1906.

(5) (1900) P. L. R. Vol. I, pp. 301, 302.

It assumes, in the first place, that the donee and the plaintiff are recognised by the custom of the parties tribe as heirs, whereas there is no proof upon the record to that effect and the provisions of the *riwaj-i-am* (which are in accordance with the ordinary rules observed by agricultural tribes in the province) are against any such contention. In the next place it overlooks the fact that defendants are in possession and that even if they are mere trespassers, they cannot be ousted unless and until the plaintiff proves that he is *entitled* by law or custom to eject them. In point of fact they are not trespassers. They held the property by virtue of a gift made in their favour by a person who was unquestionably entitled for the time being to the property, and unless plaintiff can show that he is entitled to have the gift set aside, defendants can rely upon it in answer to any claim by him. Plaintiff has in my opinion entirely failed to prove that by the custom of the tribe he is an heir to the property and that as such heir, he is entitled to have the gift set aside. Assuming, however for the sake of argument that plaintiff was in a sense a prospective heir after the death of Mussammat Karm Bhari, I still fail to see how he can claim to have the lady's gift set aside. In this connection I would refer to No. 61 P. R. 1906 (*Nur-ul-Nissa v. Gauhar-ul-Nissa*) (1) where this Court observed :—" We reject the suggestion that apart from tribal custom there is any natural presumption, as a matter of jurisprudence, that an heir, simply as prospective heir, can control the acts of the person whose estate in the ordinary course he will one day inherit. In this Province it has been found in the case of agricultural tribes, that by custom such a power of control belongs to the nearer male agnates of the proprietor, and when the parties are agriculturists of such tribes as Jats and Rajputs the existence of such a power is usually presumed by the Court. This, however, is the result of a long course of research and of judicial decisions based thereupon ; and we are not aware of any authority for making a *similar presumption* in favour of control by a female." Of course in cases where it is found that the custom of a particular tribe recognises a female such as a daughter as an heir in the absence of male lineal descendants a similar power of control may be presumed in her favour, at all events when the alienation is by a female, No. 19 P. R. 1906 (*Chiragh Bibi v. Hassan*) (2). But such cases are rare and so far as I know, no tribe in this Province recognises as an heir, in the strict sense of the term, a person

who is only the son of the last male owner's paternal aunt. The case relied upon by the Divisional Judge, No. 63 *P. R.* 1908 (*Waryama v. Hira Nand*) (1) is not in point, as it was then held that the *direct descendants of a daughter* were entitled to succeed in preference to the proprietary body who were of various *gots*. A daughter and her lineal male heirs are very frequently regarded favourably by custom in this Province.

I hold accordingly that plaintiff, even if he could be regarded as a prospective heir during the lifetime of Mussammat Karm Bhari (and in my opinion there is no evidence to support the assumption) is not entitled to have the gift made by the lady set aside, and to claim possession of any part of the property as against the donee, who has been in possession since 1898 in virtue of the gift in his favour.

I therefore accept the petition which was admitted as a further appeal, and, setting aside the decree of the Lower Appellate Court, I dismiss plaintiff's suit with costs throughout.

Appeal accepted.

No. 14.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and
Hon. Mr. Justice Johnstone.*

RAHMAT ALI KHAN (PIR)—(PLAINTIFF)—APPELLANT,
Versus

MUSSAMMAT BUBU ZUHRA AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1067 of 1908.

Custom—will—Pathans of Ferozepore—Muhammadan Law—Probate and Administration Act, V of 1881—section 90—transfer of property by administrator without permission of Court—voidable—"person interested"—Judgment in rem—Indian Evidence Act, I of 1872, section 41—Dower when nominal and unenforceable.

A Pathan, agriculturist of Ferozepore, died childless leaving 2 widows, A and B and a male collateral in the 2nd degree, C. He had made a will by which he bequeathed all his property to one of his widows A for life and after her death to the Government for charitable purposes. A obtained letters of administration. B, the other widow then sued A for her dower, *viz.*, Rs. 60,000 and made C a co-defendant, alleging that although he was not in possession of any part of the deceased's property he was the rightful heir. The First Court decreed the claim. C did not defend the case nor put in an appearance. A appealed to the Chief Court, no reference being made to C. In this appeal the two widows A and B put in a compromise and the Chief Court passed a decree in accordance therewith. By this B was declared to be entitled to possession of two-fifths of the immovable property and A to three-fifths in lieu of their respective dowers. C then brought the present suit for a

declaration that the alienations made by the compromise should not affect his reversionary rights after the death of A.

Held, that the compromise being equivalent to a sale and made without the previous permission of the Court by which the letters of administration were granted, was under section 90 (4) of the Probate and Administration Act voidable at the instance of C. who was a "person interested" in the property within the meaning of that section.

Held also, that the previous judgment passed on the compromise was not a judgment *in rem* within the meaning of section 41 of the Indian Evidence Act and was therefore no bar to the present suit.

Yara Kamma v. A. Naramma (1), *Kanhya Lall v. Rudha Charan* (2), and *Jogendra Deb Roy v. Funiindro Deb Roy* (3), referred to.

Held also, where a dower has been really promised, *i. e.*, where a sum of money has been promised and the parties really intended it to be paid on occasion arising, the Courts will not reduce it *ad miseri cordiam* or because the husband is poor, but that where no sum is ascertained or where a sum named was clearly merely nominal the promise will not be enforced, and as the sum of Rs. 60,000 claimed by B as her dower was apparently merely mentioned "for show" and by way of ceremony it was not a contract which could be enforced.

Held also, that it was not shown that these Pathans follow agricultural custom in the matter of wills and that, although the property dealt with in the will was not proved to be ancestral, the will being in favour of one heir to the exclusion of the others was invalid under Muhammadan Law.

110 P. R. 1906 (F. B.) (*Daya Ram v. Sohail Singh*) (4), referred to.

First appeal from the order of Sheikh Rukan-ud-din, Sub-Judge, first class, at Ferozepore, dated 18th May 1908.

Muhammad Shafi, for appellant.

Grey, Pestonji Dadabhai and Kanshi Ram, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—This is a suit for a declaration by Pir Rahmat Ali Khan against (1) Mussammatt Zuhra, widow of the plaintiff's first cousin, Ahmad Ali Khan, and (2) Mussammatt Sahib Jan, who was also wife of the said Ahmad Ali Khan, but who, plaintiff asserts, was divorced by her husband during his lifetime. The common ancestor Kamr-ud-Din Khan had two sons, Abbas Khan, father of the deceased Ahmad Ali Khan and Yusaf Khan, father of the plaintiff. On the 30th March 1897 Ahmad Ali Khan made a will, a translation of which will be found at page 14 of the paper book, in it the testator first set forth the immovable property of which he claimed to be full owner. He then stated that he had divorced

22nd May 1911.

(1) (1884) 2 Mad. II. C. R. 276.
(2) (1867) 7 W. R. 338.

(3) (1871-2) 14 M. I. A. 367.
(4) 110 P. R. 1906 (F. B.).

Mussammat Sahib Jan according to Muhammadan Law on account of her evil conduct and declared that for this reason she and also her daughter-in-law, who had also behaved badly, have no rights in the property aforesaid. He then laid it down that he himself would remain proprietor and manager of the property till his death ; that, if any son should be born to him by Mussammat Zuhra, he should succeed to the entire property, but if no such issue should be born, then Mussammat Zuhra should succeed to the whole of the property except two shops and a *haveli* and a well otherwise dealt with, provided that the said Mussammat Zuhra should remain faithful to his memory and lead a moral life. If she turns unchaste, the will proceeds, then she is not to have anything, but otherwise she is to be the *absolute proprietor of the income accruing from the entire property, but to have no power to mortgage or sell except for pressing necessity*. Certain land is to be left as before with plaintiff for cultivation merely ; and it is then again recited that Mussammat Sahib Jan shall have no right in respect of the property, she having been absolutely deprived of it ; finally it is recorded that after the death of Mussammat Zuhra without issue, the entire property shall go to Government which shall spend the income in various charitable ways.

Having executed this will Ahmad Ali Khan died on the 25th October 1897, and on the 9th February 1900 Mussammat Zuhra obtained probate. Mussammat Sahib Jan then sued Mussammat Zuhra for Rs. 60,000 which she alleged to be the amount of her dower, and in that case she made the present plaintiff a defendant giving as her reason that, although he is not in possession of any part of the property of the deceased Ahmed Ali Khan, yet he is the rightful and legal heir of the deceased and has denied the plaintiff's claim (see paragraph 6 of the plaint in that case, page 8 of the printed paper-book). The judgment in that case of the first Court was in favour of Mussammat Sahib Jan and gave her a decree for Rs. 60,000 in which the name of the present plaintiff does not appear at all as indeed it also does not appear in the judgment. An examination of the paper-book in that case also shows that the present plaintiff made no appearance and in no way defended the case. Mussammat Zuhra appealed to this Court (See Civil Appeal 639 of 1903) and in that appeal also the plaintiff's name does not appear nor in the grounds of appeal in any reference made to him. In this Court the parties put in a compromise, which, after verification by the District Judge of Ferozepore, was sanctioned by a Division Bench of this Court

on the 18th October 1906. The appeal was accepted and a fresh decree was drawn up in accordance with the terms of the *razinama*, which had been duly registered on 22nd March 1906. By that decree it was ordered that the plaintiff Sahib Jan is entitled to possession of two-fifths of the immovable property left by the late Pir Ahmad Ali Khan and the defendant Mussammat Zuhra is entitled to three-fifths thereof in absolute ownership, in lieu of their dowers of Rs. 60,000 and Rs. 80,000, respectively, and that they should be at liberty to realize from their respective shares above set forth their respective dowers. The next item in the decree is immaterial, and then, finally in accordance with the compromise, it is ordered that a certain other suit, which Sahib Jan had instituted in the Court of the Sub-Judge, Ferozepore, for half the property left by the late Ahmad Ali Khan as his widow, should be withdrawn.

A few months later on 9th January 1907 the present suit was instituted in which the prayer is for a declaration that the alienation by the deed of 22nd March 1906 aforesaid is void and shall not affect plaintiff's reversionary rights after the death of Mussammat Zuhra. Upon this plaint and the pleas of the two defendants Zuhra Begam and Mussammat Sahib Jan the Court framed issues and took evidence, and on 18th May 1908 wrote a judgment dismissing plaintiff's suit with costs on the ground that he had no *locus standi*. It found (a) that though plaintiff was next reversioner he had no *locus standi* because the property was not ancestral and the will was valid by custom though not by Muhammadan Law; (b) that plaintiff had never admitted the validity of the will and so was not estopped from contesting its validity; (c) that plaintiff though he did not defend the dower case of 1903 and though the decree in it was *ex parte* against him was bound by that decree, (d) that it is not proved that the property taken by Mussammat Sahib Jan under the deed of 22nd March 1906 is worth more than the Rs. 60,000 claimed by her as dower and allowed to her by the D. J. in that case; (e) that though the will was valid, the transfer by Mussammat Zuhra Begam to Mussammat Sahib Jan of immovable property in 1906 is invalid for want of the sanction of the Court that granted probate; (f) that plaintiff cannot dispute the amount of Mussammat Sahib Jan's dower or the necessity for its payment; (g) that the transfer aforesaid was not *bonâ fide*; (h) that plaintiff can take action under sections 139—140 Probate Act, in connection with the illegal transfer to Mussammat Sahib Jan.

The judgment is by no means a lucid one. In effect it lays it down in favour of plaintiff :—

- (i) That he is next reversioner ;
 - (ii) That the will would be invalid by Muhammadan Law ;
 - (iii) That plaintiff can contest the validity of the will ;
 - (iv) That the transfer (by partition, as the deed calls it) of 22nd March 1906 was invalid for want of D. J.'s sanction ;
 - (v) That that transfer was *malâ fide* ;
- and *against* plaintiff it has found :—

- (1) That the land, not being ancestral, Ahmad Ali Khan could *by custom* alienate it by will as he chose ;
- (2) That the decree in the dower case binds plaintiff and that he cannot be heard to say that the dower of Mussammat Sahib Jan was less than Rs. 60,000 and was not payable ;
- (3) That plaintiff's proper remedy is by action under sections 139—140 Probate Act.

Mr. Grey, appearing for respondents admits that this last finding is incorrect, and we need not refer to it again.

We may also record our finding at once, that finding (i) is correct as also is finding (iv) which has not been seriously contested here. As regards (iii) Mr. Grey who began the argument for the respondents contended that for two reasons that finding is incorrect—first because in his plaint the plaintiff relies on the will and bases his prayer on it, and therefore cannot be heard to say it is invalid ; and secondly, because he has kept certain items of property allotted to him under the will and so must be taken to have acquiesced in it. As regards the first of these contentions we think Mr. Shafi's reply is adequate. The will is divisible into two parts—the conferment upon Mussammat Zuhra of an estate, after testator's death, practically the same as a widow's life estate under Punjab custom ; and next the prospective creation of a *wakf*, to be administered by Government after the death of Mussammat Zuhra. Plaintiff has no objection to the first part, even had there been no will at all he would have raised no objection to Mussammat Zuhra's holding the entire property on a life-tenure and it is for this reason that he urges in his plaint that (even) under the will the act of Mussammat Zuhra of 22nd

March 1906 is *ultra vires*. He no doubt in a sense bases his protest on the will, but that he does not accept the will as a will and in its entirety is clear from his assertion in the plaint that he is entitled to the property after the death of Mussammât Zuhra—see paragraph I,—which he would not be under the will, and also from paragraph 10 of the plaint in which he calls himself the reversioner (which he is not under the will) and says the transaction of 22nd March 1906 was entered into with a view to cause loss to him.

Mr. Grey's second contention also seems to us to have little force.

The property alluded to was already in the possession and enjoyment of plaintiff and he simply allowed things to remain as they were. It does not appear to us that it can fairly be said that, because he did not insist upon Mussammât Zuhra taking over the said property, or because he did not insist upon an immediate division of the whole of the property according to Muhammadan Law he accepted the will in its entirety. We therefore agree with the Court below that plaintiff is not in any way debarred from contesting the validity of the will.

Finding (*iv*) is based upon section 90 (4) Probate Act, 1881 and it seems to us correct. Defendant's case is that the estate owed some Rs. 60,000 to Mussammât Sahib Jan and that the transfer to her of certain properties on 22nd March 1906 was virtually a sale to her against this claim. Mussammât Zuhra, the administratrix, did not secure the previous permission of the D. J. to this transfer and it is therefore—see section 90 (3) (a) and section 90 (4)—voidable at the instance of plaintiff, who is undoubtedly an "interested" person. The only thing Mr. Pestonji (for respondents) can say in refutation of this is that the point was not raised in the plaint, but the learned Sub-Judge has taken the question as included in issue II, the parties seem to have understood the point as being one for decision, and we are not disposed to rule it out, because it was not specifically mentioned in the plaint.

Passing over for the present finding (*v*), which comes up more conveniently for discussion later, we come to the points decided adversely to plaintiff, and of them it is more convenient to deal with (2) first. It is practically admitted that the rule contained in section 13 Civil Procedure Code has no application. Mr. Shafi points out that the issues in the dower suit were not the same as in the present case; that none of the findings of the First Court in that case now subsist, inasmuch as the decree of the Chief Court on the compromise expressly cancels the

decree and therefore all the findings of the First Court; and that the case was ultimately disposed of by a compromise entered into without any reference to plaintiff and by a decree based on that compromise, in which decree no findings against plaintiff are embodied. We accept this view of the matter. But Mr. Grey and Mr. Pestonji, while admitting that the ordinary law of *res judicata* has no application, contend that the judgment and decree of 18th October 1906 were *in rem* and not *in personam* and so bind plaintiff, and would bind him even if he had not been a party to that suit. [It is hardly necessary to note that the final order in the *probate case* could at most bind plaintiff only as regards the execution of the will and the fitness of Mussammat Zuhra as administratrix].

This contention that the judgment of 18th October 1906 was a judgment *in rem* seems to us untenable. Mr. Pestonji rightly admits that section 41, Indian Evidence Act, does not cover such a suit as that of Mussammat Sahib Jan, and it is therefore not necessary for us to discuss *Ahmedbhoj Habibbhoj v. Fadleebhoj Cassumbhoj* (1) referred to by him earlier in his argument. Section 42 is obviously inapplicable, but it is urged that section 43 applies, inasmuch as the previous litigation and the decree ending it are "facts in issue."

To refute this it is enough to refer to the definition in the Act of the phrase "fact in issue" section 3. Then, it is argued, that plaintiff even if not a party to Mussammat Sahib Jan's decree was "privy" to it, in the sense in which the word is used in English Law. To this we reply that whatever the English Law may be, we are bound by the law of British India.

Lastly, Mr. Pestonji urges that section 41 is not exhaustive as to judgments *in rem* and that this is such a judgment even though section 41 does not cover it. We are wholly unable to accede to this suggestion. The whole question of judgments *in rem* in India was exhaustively discussed in *Yara Kamma v. A. Naramma* (2), *Kanhya Lall v. Radha Churn* (3), *Jogendra Deb Roy v. Fnuindro Deb Roy* (4). In these rulings learned Judges specified what were judgments *in rem* in this country and what were not, and the result was embodied in section 41 Indian Evidence Act aforesaid. For these reasons we are constrained to hold that finding (2) aforesaid is unsound and must be overruled. But Mr. Pestonji argues further that, even if the question is not concluded against plaintiff, it has been

(1) (1882) 1 L. R. 6 Bom. 703.

(2) (1884) 2 Mad. H. C. R. 276.

(3) (1867) 7 W. R. 338.

(4) (1871-2) 11 M. I. A. 367 (374).

actually proved in the present case that the dower of Mussamat Sahib Jan was fixed at Rs. 60,000, and that that sum was really payable to her out of the estate. It cannot be denied that Rs. 60,000 was mentioned at marriage as the dower of this lady, but the real question is whether either party really meant that so large a sum was ever to be paid. The oral evidence both for plaintiff and for defendant raises up a strong presumption in favour of a negative answer to this question. His first witness is an added defendant, Muhammad Nawaz Khan of the same tribe as the parties, who admits he had never seen Rs. 60,000 paid as dower, though he says he will pay his own wife at this rate on occasion arising. The next witness, Fatch Din Khan, also a Pathan, says dowers in the tribe are always stated at Rs. 60,000 but are never paid, his own wife's even being so fixed, though he is on service at Rs. 15 *per mensem*; all the other witnesses say the same sort of thing. The next one, Najib Khan, mentions the suit of Mussammatt Aishan *v.* Khudadad for half her dower Rs. 30,000, a Kasur Pathan case. The judgment of the Chief Court, laying it down that in the tribe in question the dower is only fixed "for show" and allowing finally only the *sharai* dower of Rs. 26-8-0, will be found at page 3 of the paper-book. Next, Fatch Din, witness No. 4 for plaintiff, says *nobody has ever paid* the universally named dower of Rs. 60,000. Witness No. 5 seems to think that a very wealthy man might have to pay up, but admits no such payment has ever been made in fact. Witness No. 6 says the naming of this large sum at marriage is merely "by way of ceremony and there is not the least intention" of paying. Witness No. 7 says a wife urging her claim must get something of course, but that none has yet received Rs. 60,000, and none can expect so much even if the husband is wealthy. He instances the Nawab of Mamdot a very rich gentleman, who in such a case gave only Rs. 100 *per mensem* as maintenance in lieu of dower, the evidence of witness No. 8 is to the same general effect.

Of the defence witnesses No. 1, Hidayat-Ullah Khan, page 95, mentions a case of payment of Rs. 80,000 as dower 180 years ago, and he gives in cross-examination other instances, without dates, of portions of dower being paid. He admits that *in all cases*, whether the husband is rich or poor dower is fixed at Rs. 60,000 to Rs. 80,000, and that a poor man pays "according to his means."

To meet all this, Mr. Pestonji refers us to plaintiff's own statement as witness in Mussammatt Sahib Jan's dower case

but all we can find there is that plaintiff said Rs. 60,000 was fixed as dower. This does not carry us any further. Next he points to the statement of plaintiff's mother in that case, in which some instances are given of payments of Rs. 60,000 as dower. (This lady is dead and we have overruled Mr. Shafi's objection to the admissibility of her deposition in evidence). The evidence is, however, all hearsay, except as regards the case of Abbas Khan, and on the whole we do not think it suffices to overthrow the evidence for the plaintiff, which is in accordance with probabilities.

The question is what in circumstances such as the present the Court should and can do. In our opinion consideration of the authorities shows that, where a dower has been really promised, *i. e.*, where a sum has been promised and the parties really intended it to be paid on occasion arising, the Courts will not reduce it *ad misericordiam* or because the husband is poor, but that where no sum is ascertained or where a sum named was clearly merely nominal, the promise will not be enforced. We have already adverted to Civil Appeal No. 984 of 1894, page 3, paper-book, where no definite sum was found to have been fixed. In that judgment certain previous authorities are cited, to only one of which we have been specifically referred, namely, Civil Appeal No. 659 of 1892, in which a sum of Rs. 27,500, found actually fixed, was ordered to be paid. Mr. Pestonji also refers us to the Chief Court judgment in Civil Appeal No. 575 of 1901, page 55, paper-book, in which we find it laid down that the District Judge was in error in first finding a certain sum proved as being promised and then reducing the amount in consideration of defendant's financial condition—Article 83, Rattigan's Digest, is (see remark) in accord with this. *Zakeri Begum v. Sakina Begum* (1), quoted by Mr. Pestonji, does not seem to help here. It appears to us that such *dicta* as that in Civil Appeal No. 575 of 1901 aforesaid cannot properly be employed to cover cases in which both parties to the marriage knew that the naming of a large sum as dower was merely for show and by way of ceremony. The evidence satisfies us that this was so in the present case, and therefore there was really no *contract* to pay the sum in question.

Returning to finding (1) of the findings against the plaintiff it has to be admitted that the property dealt with in the will is not proved ancestral; but the lower Court seems to us to be in error in deducing from this that Pir Ahmad Ali Khan

could do what he liked with it. There is absolutely no proof that in the matter of wills these Pathans follow agricultural custom. It may be that they do allow widows to have a life interest; but it does not in the least follow from this that male heirs have lost their right to invoke the *dictum* of the Muhammadan lawyers that a will in favour of one heir to the complete exclusion of the others is invalid except with the consent of those heirs. In this connection we need only point to 110 *P. R.* 1906 (*F. B.*) (*Daya Ram v. Soheli Singh*) (1). Even if plaintiff be taken to have pleaded that Mussammat Zuhra, having got under the will an estate like a customary widow's estate only and so could not alienate, without "necessity," it does not follow that he meant to say that the will was valid because it was not opposed to agricultural custom, we, therefore, overrule finding (1).

Holding the above views, it is clearly impossible for us to admit the force of Mr. Pestonji's last contention, which merits notice, that at all events, Mussammat Zuhra, in making the compromise objected to, acted under pressure of "necessity." She had no power so to act—see finding (*iv*) above. By the compromise she not only handed over two-fifths of the entire estate to Mussammat Sahib Jan in full ownership, but herself appropriated the remaining three-fifths, also in full ownership, thus in effect administering the estate to a finish, in flat contravention of the provisions of the Probate Act.

For these reasons we decree the appeal and give plaintiff the declaration asked for by him, with costs in both Courts against both defendants.

Appeal accepted.

No. 15.

Before Hon. Mr. Justice Johnstone.

SAIF-UD-DIN AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

HANS RAJ—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1057 of 1910.

Indian Limitation Act, IX of 1908, articles 12 and 144—suit for possession of property sold in execution of a decree—Limitation.

Held, that where the plaintiff in a suit for possession of property, sold in execution of a decree, was the original owner of the property and was not a party to the decree under which the sale took place, nor a representative of any of the parties and was consequently in a position to ignore the sale altogether, article 12 of the Limitation Act has no application and the suit falls under article 144.

(1) 110 *P. R.* 1906 (*F. B.*).

Malkarjun v. Narhari (1), *Moti Lal v. Karrabuldin* (2), *Khiaarajmal v. Daim* (3), *Jwala Sahai v. Masiat Khan* (4), and *Kadar Husain v. Hussain Sahib* (5), referred to.

Further appeal from the order of H. Harcourt, Esquire, Divisional Judge, Jullundur Division, dated 25th July 1910.

Sheo Narain, for appellants.

Sukh Dial, for respondent.

The judgment of the learned Judge was as follows :—

5th June 1911.

JOHNSTONE, J.—In December 1907 the sale of the property in dispute by auction was confirmed. Defendant No. 1 was the decree-holder and defendant No. 2 the judgment-debtor. The plaintiffs filed objections, but these were dismissed on the 10th March 1908, as having been filed after the sale was confirmed. They then proceeded to institute a declaratory suit on the 17th July 1908, which was dismissed on the 2nd March 1909, on the ground that the auction purchaser, defendant No. 3, was in possession and that therefore the suit should have been for possession. Upon this the plaintiffs filed the present suit for possession on the 21st May 1909. The first Court gave plaintiffs a decree holding *inter alia* that the suit was within time ; but the learned Divisional Judge applying article 12 of the Limitation Act, ruled that the suit was time-barred. He held, with reference to *Malkarjun v. Narhari* (1) that article 12 was applicable, and he also held that section 14 of the Limitation Act did not enable plaintiffs to exclude in the computation of time the period during which they were prosecuting their declaratory suits. The plaintiffs have now come up to this Court on the revision side and the petition has been admitted as a further appeal on the ground of limitation.

In my opinion article 12 of the Limitation Act does not apply at all. The way I look at the case is this. Whenever an auction sale takes place there are always certain people who are bound by it to this extent, that if they wish to avoid it they must sue directly to have it set aside ; and there are also persons who may simply ignore the sale. With reference to this, I draw attention to *Moti Lal v. Karrabuldin* (2). In my opinion the present is one of the cases in which the plaintiffs can ignore the sale. Their original title to the property in suit is not denied and they were not parties to the decree under

(1) (1900) *I. L. R.* 25 Bom. 337 (P. C.). (3) (1904) *I. L. R.* 32 Cal. 296 (P. C.).
(2) (1897) *I. L. R.* 25 Cal. 179 (P. C.). (4) (1904) *I. L. R.* 26 All. 346.
(5) (1896) *I. L. R.* 20 Mad. 118 (F. B.).

which the sale took place, nor has anything happened since, which in my opinion makes them representatives of any of the persons so interested. No doubt after the death of Mussamat Jiwi there was dispute between the plaintiff and defendant No. 2, the judgment-debtor aforesaid, as to the right to hold the property in suit and a criminal case occurred which was compromised. Money passed from plaintiffs to defendant No. 2, and the property in suit was admitted to be the property of the plaintiffs. It seems to me that, inasmuch as the original title of the plaintiffs, as has already been said, is not denied this transaction was not a sale by defendant No. 2 to the plaintiffs, but rather that the plaintiffs were the original owners of this property and remained owners all along up to the present moment.

Taking it then that the plaintiffs were not parties to the decree or the execution and in no way claim under any of those parties, it only requires a careful examination of the following rulings to show that the plaintiffs' case does not fall under article 12 aforesaid, *viz.* :

Malkarjun v. Narhari (1), *Khiarajmal v. Daim* (2), *Jwala Sahai v. Masiat Khan* (3), and *Kadar Hussain v. Hussain Sahib* (4). It is not necessary to discuss these rulings in detail. It is sufficient to say here that the Bombay ruling is concerned with one set of facts and that the Calcutta ruling explains that the Bombay ruling does not apply universally to all suits for property which has been sold by auction in execution of a decree. The Allahabad ruling seems to me to put the distinction in a very satisfactory manner. Mr. Sukh Dial urges that the Allahabad ruling is incorrect, but I am unable to agree with him and I prefer to follow it.

The above remarks really dispose of the case, but I may observe that Mr. Sheo Narain for the appellants also urges that under section 14 he should be allowed to exclude, even if article 12 does apply, the period during which his clients were prosecuting the declaratory suit. In my opinion the proposition is more than doubtful, but I need not discuss it at length because my finding is that the suit is governed not by article 12 but by article 144 of Schedule II of the Limitation Act.

For these reasons I accept the appeal, set aside the order of the learned Divisional Judge and remand the case to him for decision on merits.

Appeal accepted.

(1) (1900) *I. L. R.* 25 *Bom.* 337 (*P. C.*). (3) (1904) *I. L. R.* 26 *All.* 346.
(2) (1904) *I. L. R.* 32 *Cal.* 296 (*P. C.*). (4) (1896) *I. L. R.* 20 *Mad.* 118 (*F.B.*).

No. 16.

Before Hon. Mr. Justice Shah Din.

UMRA—(PLAINTIFF)—APPELLANT,

Versus

KARIM BAKHSH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 869 of 1910.

*Custom—Succession—to heirless estates—pattidars and proprietary body—
escheat to Government.*

The *Ricaj-i-am* provided that in the event of a proprietor dying without leaving any blood relation his or her land should go first to the *thuladars*, then to the *pattidars* and thereafter to the proprietary body of the village. On the death of one of the proprietors heirless, his land had however been mutated in the names of the defendants, the *pattidars*, who were of the same tribe as deceased, to the exclusion of plaintiff who, though a *pattidar*, belonged to a different tribe and was a proprietor by purchase.

Held, that under the *Ricaj-i-am* plaintiff as a *pattidar* had equal rights of succession with the other *pattidars*, and that the *onus* of proving that he had not was on the latter, which *onus* they had failed to discharge.

Held also, following 2 P. R. 1911 (Rev.) (*Wazira v. Mangal*) (1), that, as there was a distinct provision in the *Ricaj-i-am* declaring the rights of the *pattidars* and ultimately of the proprietary body to succeed to the lands of heirless owners, there was no escheat to Government.

Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge, Ludhiana, dated the 30th May 1910.

Muhammad Iqbal, for appellant.

Brij Lal, for respondents.

The judgment of the learned Judge was as follows :—

15th June 1911.

SHAH DIN, J.—The facts of this case are very fully stated in the judgment of the learned Divisional Judge, and it is unnecessary to repeat them here. The sole question for decision in this appeal is whether the plaintiff, who was admittedly a proprietor in the *patti* in which the land in suit is situate at the time of the death of Mussanmat Aishan, is entitled as such *pattidar* to succeed to a proportionate share of the land left by Mussanmat Aishan along with the defendants, who are proprietors in the same *patti*, and in whose favour the whole of the land in question has been mutated.

The view taken by the learned Divisional Judge is, in my opinion, indefensible. The mutation proceedings which followed the death of Mussanmat Aishan show that the defendants succeeded to her land on the grounds that she had died without

leaving any blood relations and that they, as proprietors in the *patti*, were entitled to inherit her immovable property (see the order of the Naib-Tahsildar, dated the 24th November 1908). The defendants stated before the Revenue officer that only such of the *pattidars* were entitled to succeed to Mussammat Aishan's land as had been entered in the *shajra nasab* of the last regular settlement, and mutation was ordered accordingly. The defendants are all Gujars by caste, but they belong to three different *gots*, namely, *Khapar*, *Bhosli* and *Posiwal*, the members of the fourth *got*, *Tawungar*, having died out before the settlement. The entry in the *Riwaj-i-am*, to which reference is made by the Divisional Judge, is to the effect that in the event of a proprietor dying without leaving any blood relations, his or her land would go first to the *thodadars*, then to the *pattidars* (*malikan-i-patti*) and thereafter to the proprietary body of the village. The defendants succeeded to the land left by Mussammat Aishan in their capacity of *pattidars* in accordance with the rule of succession laid down in the *Riwaj-i-am*; and the Divisional Judge is not justified in assuming that they had no right to succeed to the land in dispute and that their possession must be considered as that of trespassers without any legal title. The defendants never set up this plea, and it was not competent to the Divisional Judge to set it up for them. If, then, the defendants succeeded to Mussammat Aishan's land as *pattidars* in conformity with the rule of custom laid down in the *Riwaj-i-am*, does it lie in their mouths now to say that the plaintiff, although a *pattidar* like themselves, has no right to succeed to a proportionate share of the land simply because he is a Jat and does not belong to the same caste as Mussammat Aishan, or because he is a proprietor by purchase and his name does not appear as a proprietor in the *shajra nasab* prepared at the last regular settlement?

The entry in the *Riwaj-i-am* confers the right of succession upon the *pattidars* pure and simple, and prescribes no limitation to the effect that only those *pattidars* can succeed to the land of an heirless proprietor who belong to his or her *got* or who are entered as proprietors at the last settlement. The defendants having themselves succeeded to the land in suit under the customary rule enunciated in the *Riwaj-i-am*, the *onus* lies upon them of proving that the plaintiff who is a *pattidar* equally with them, has not an equal right of succession. This *onus* they have clearly failed to discharge, and the plaintiff's claim therefore must succeed.

It is admitted before me by the respondents' counsel that some of the *pattidars* in whose favour mutation has been effected

in respect of Mussammat Aishan's land are only proprietors by purchase like the plaintiff and it follows, therefore, that the mere fact that the plaintiff is a proprietor by purchase does not preclude his succeeding to the land along with the defendants. None of the published decisions of this Court bear directly upon the point before me, but I may add that, according to the latest exposition by the highest Revenue authority in this Province of the principles which would regulate succession to heirless land in a village, the land in dispute would not escheat to Government, inasmuch as there is in this case a distinct provision in the *Riwaj-i-am* declaring the right of the *pattidars* and ultimately of the proprietary body to succeed to the land of heirless owners (see No. 2 P. R. (Rev.) 1911 (*Wazira v. Mangal*) (1)). According to this authority, the view taken by the Divisional Judge that the defendants themselves had no title to succeed to Mussammat Aishan's land is unsustainable, and it must be held that they are rightfully in possession of her land as *pattidars*. In these circumstances it is but bare justice to hold, in view of the entry in the *Riwaj-i-am* above referred to, that the plaintiff has a right to succeed to the land of the deceased equally with the defendants.

I accept the appeal and reversing the decree of the Lower Appellate Court, I restore that of the First Court with costs throughout.

Appeal accepted.

No. 17.

Before Hon. Mr. Justice Rattigan.

GHULAM MUHAMMAD—(DEFENDANT)—APPELLANT,

Versus

LATIF AHMAD KHAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 264 of 1911.

Muhammadian Law—mortgage by one adult son (having several minor brothers and sisters) of ancestral house in order to raise funds for one sister's marriage—suit by minor brothers for possession in disregard of the mortgage—benefit of minors—reasonableness of amount spent on the marriage—estoppel.

Held, that among Muhammadans of the Lahore city bound by Muhammadan Law, a mortgage of ancestral house property made by the only adult son, in order to raise a loan for the marriage expenses of a sister, is not for the benefit of the latter's minor brothers and therefore not binding on them.

Hurbai v. Hiraaji B. Shanja (2) referred to.

Held also, that a brother is not justified in expending about half the patrimony of himself and his three brothers upon the *doli* ceremonies of one of his sisters.

Held further, that defendant-mortgagee in a suit by the minor sons for possession of the mortgaged property, in disregard of the mortgage, was not estopped from asserting that the widow and daughters were entitled to share in the property.

Further appeal from the order of S. Wilberforce, Esquire, Additional Divisional Judge, Lahore, dated the 5th November 1910.

Durga Das, for appellants.

Tek Chand, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—The parties to the case are Muhammadans of 24th October 1911. Lahore city and admittedly governed, in matters relating to alienation of property, by the rules of Muhammadan Law. The principal question in this case is whether a mortgage of an ancestral house (which was practically the only property belonging to the family) by one of four brothers (of whom all except the executant were at the time of mortgage, minors) is binding on the family because the money was raised in order to defray the expenses incidental to part of the ceremonies consequent upon the marriage of one of the daughters of the late owner of the property. It appears that the latter, Muhammad Sharif, married his said daughter, in 1899, to the son of a Settlement Tahsildar and the *nikah* was duly performed in that year. Muhammad Sharif died in 1900, and apparently the only property which he left to his family was the house now in suit of which the value is said to be about Rs. 3,000. The deceased left a widow, four sons and two daughters, and in 1903, when Bashir Ahmad, the eldest son, had but recently attained his majority, the ceremonies connected with the removal of the *doli* of the married daughter had to be performed. In order to raise money for these ceremonies and also (it is alleged) in order to provide for the maintenance of the family, the adult son, Bashir Ahmad, mortgaged the house in question to one Feroz Din for Rs. 1,000. The widow of Muhammad Sharif attested this deed as a consenting party. In 1904 Feroz Din sold his mortgagee rights to one Muhammad Hussan, and in 1905 Bashir Ahmad executed an additional mortgage in favour of that person for Rs. 96.

In November 1905, Bashir Ahmad executed a mortgage-deed in favour of defendants, the property mortgaged being

the said house and the consideration being stated to be Rs. 1,500. This sum was made up as follows:—

- (a) Rs. 1,100 paid to Muhammad Hussan, the prior mortgagee;
- (b) Rs. 25 for expenses connected with the execution and registration of the mortgage-deed, and
- (c) Rs. 375, representing a sum paid by the mortgagee for a house mortgaged to him and transferred to the mortgagor for purposes of residence.

Plaintiffs who are the three sons of Muhammad Sharif, who were no parties to the mortgage by their adult brother, Bashir Ahmad, sue for possession of three-fourths of the mortgaged house on the ground that the mortgage was executed by one who was a merely *de facto* guardian and that, as it was not for their benefit, they are in no way bound by it.

Defendants pleaded that the mortgage was valid and binding upon the plaintiffs, but the Lower Courts are agreed that it is not proved that any money was borrowed for the purposes of the family and that under Muhammadan Law, Bashir Ahmad, as the *de facto* guardian of his younger brothers, was not justified in mortgaging their property in order to raise money for the ceremonies connected with the marriage of their sister, sums borrowed for such purpose not being for the benefit of the minors. Defendants had further pleaded that in any event plaintiffs were not entitled to three-fourths of the house, inasmuch as they could not claim possession of such shares in the said house as belonged to the widow and the two daughters of Muhammad Sharif, who were no parties to the suit. This plea was overruled by the Lower Courts on the ground that as defendants had in their mortgage-deed accepted the four sons of Muhammad Sharif as alone entitled to the house, they were estopped from now asserting that they were other persons entitled to share therein. Plaintiffs' suit was accordingly decreed in full.

Defendants applied to this Court for revision of this decree and I have heard lengthy arguments on both sides.

In my opinion, the Lower Courts were fully justified in holding that the mortgage was not for the benefit of the plaintiffs who were then minors. There is no proof that any money was borrowed for their maintenance, and there is authority for the proposition that a loan raised for the marriage expenses of a sister is not for the benefit of the latter's minor brothers,

Hurbai v. Hiraji B. Shanja (1). Apart from this objection, there is, as the Divisional Judge points out, no proof that any definite sum was borrowed for that purpose, and in any event I cannot agree that Bashir Ahmad was justified in expending about half the patrimony of himself and his brothers upon the *doli* ceremonies of one of his sisters. I cannot, however, agree that in cases such as the present the defendants are estopped from setting up the rights of third persons to part of the property. Ordinarily, a mortgagee who accepts a certain person as the owner of specific property and takes a mortgage of the property from the latter, is estopped from denying the title of the mortgagor, in a claim by the latter to the property. But in such a case, as in the case of landlord and tenant, this estoppel is founded upon the contract between the parties, and it can have no operation when that contract is alleged by the other party to be void. Plaintiffs, in other words, cannot both approbate and reprobate the mortgage. If, as they contend, it is a mere nullity as against them, they cannot in the same breath urge that defendants are thereby estopped from asserting that the widow and daughters of Muhammad Sharif are entitled to share in the property. Here plaintiffs have entirely repudiated any contractual relationship between themselves and defendants, and the latter are therefore, in my opinion, entitled to show that plaintiffs are not the owners of all the property claimed by them.

In point of fact it is not denied that plaintiffs are entitled only to $\frac{1}{10}$ ths of the property, I accordingly so far accept this appeal as to amend the decree of the Lower Appellate Court by giving plaintiffs a decree for possession merely of $\frac{1}{10}$ ths of the property in suit. I need hardly say that this judgment will not affect any right which the other members of the family may have to recover their respective shares from the defendants.

In the circumstances of the case I leave the parties to bear their own costs in this Court.

Appeal accepted.

No. 18.

Before Hon. Mr. Justice Kensington.

PEOPLE'S BANK OF INDIA, LIMITED—(PLAINTIFF)—
PETITIONER

Versus

ABDUL KARIM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 3083 of 1910.

Indian Stamp Act, II of 1899, sections 12 and 35—Admissibility in evidence of hundi bearing adhesive stamps not properly cancelled—proof of debt apart from the hundi.

Held, that a hundi bearing adhesive stamps not properly cancelled at the time of execution, is not admissible in evidence (*vide* sections 12 and 35 of the Stamp Act).

Virbhadrappa v. Bhimaji Balaji (1), referred to.

Held also, that under the circumstances of the case the Lower Courts were wrong in refusing to take evidence apart from the hundi as to the existence of the debt.

66 P. R. 1906 (*Ganga Ram v. Amir Chand*) (2), *Parsotam Narain v. Taley Singh* (3), *Virbhadrappa v. Bhimaji Balaji* (1) and *Banarsi Parsad v. Fazl Ahmad* (4) referred to.

Petition under section 70 (a) of Act XVIII of 1884 for revision of the order of M. Zafar Ali, District Judge, Rawalpindi, dated the 16th June 1910.

Ganpat Rai, for petitioner.

Duni Chand, for respondents.

The judgment of the learned Judge was as follows:—

16th Nov. 1911.

KENSINGTON, J.—On the 18th March 1909 a hundi for Rs. 200 was drawn by Abdul Karim on Nabi Bakhsh and Abdul Karim in favour of the People's Bank. The hundi was dishonoured and the bank has sued for the amount.

The Lower Courts have agreed in finding that the hundi is not admissible in evidence because the stamps were not properly cancelled as required by section 12 of the Stamp Act.

The suit has in consequence been dismissed.

I am not prepared to say that the Lower Courts are wrong in holding that the stamps were not properly cancelled, or in their application of the full rigour of the law in consequence of the omission. It is doubtless somewhat harsh law to insist

(1) (1904) *I. L. R.* 28 Bom. 132.
(2) 66 P. R. 1906.

(3) (1903) *I. L. R.* 26 All. 178.
(4) (1905) *I. L. R.* 28 All. 298.

so rigorously upon the cancellation of the stamps at the time of execution, but, as the law itself is perfectly clear, the Courts are bound to administer it, even though the omission may be merely due to the carelessness of some office subordinate in the press of bank business. *Virbhadrappa v. Bhimaji Balaji* (1) is a sufficient authority to quote upon this point.

The Lower Courts have, however, gone materially wrong in refusing to take evidence apart from the *hundi* as to the existence of the debt. The plaint is drawn in sufficiently wide terms and, though it is possible that there may be some defence to the action on the merits, the suit is, *prima facie*, well within time and based upon evidence as to consideration which should not be summarily rejected. It is not right that a debtor should escape liability merely on a technical plea such as that which has been at present the only plea put forward.

The rulings 66 P.R. 1906 (*Ganga Ram v. Amir Chand*) (2) and *Parsotam Narain v. Taley Singh* (3) have been quoted on behalf of the defendants, but these cases are easily distinguishable. The particular point which is not to be considered has been dealt with in *Virbhadrappa v. Bhimaji Balaji* (1) and *Banarsi Prasad v. Fazal Ahmad* (4). In each case it has been held that the plaintiff is entitled to fall back upon evidence to prove the original transaction and these are the rulings which I think it proper to follow in the present case.

The revision is accordingly allowed, and the decrees of the Lower Courts are set aside. The case is remanded to the First Court for decision on the merits in accordance with the above. The costs of the Lower Appellate Court and of this Court will be costs of the cause.

Revision accepted.

No 19.

Before Hon. Mr. Justice Robertson.

MUHAMMAD AND EIGHT OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MUSSAMMAT BAKHTO AND EIGHT OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 920 of 1910.

Custom—Succession—daughters and sisters—Pathans, tahsil Mianwali.

Held, that by custom among Pathans, *tahsil* Mianwali, daughters and sisters can only be excluded from inheritance to their fathers and brothers by collaterals not more remote than the 6th degree.

(1) (1904) I. L. R. 28 Bom. 432.

(2) 66 P. R. 1906.

(3) (1903) I. L. R. 26 All. 178.

(4) (1905) I. L. R. 28 All. 298.

Held also, that the general rule of computing degrees of relationships, viz., from deceased to common ancestor of the claimants, the deceased and ancestor being each counted as one, must be held to apply unless the contrary is proved, and that the plaintiffs in this case had not discharged the onus which lay upon them.

126 P. R. 1890 (*Ladhu v. Mussammat Daulati*) (1), 106 P. R. 1892 (*Nur Muhammad v. Ghulam Habib*) (2), 74 P. R. 1906 (F. B.) (*Karim Bakhsh v. Jehandad Khan*) (3) referred to.

48 P. R. 1908 (*Girdhari Ram v. Faizullah Khan*) (4) distinguished.

Further appeal from the order of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated 16th June 1910.

Nand Lal, for appellants.

Nanak Chand, for respondents.

The judgment of the learned Judge was as follows:—

11th Nov. 1911.

ROBERTSON, J.—The plaintiffs in this case sue as rever-
sioners of one Dauran Khan for possession of his estate to which
defendant, daughter of Dauran Khan, was also a claimant. It
appears that Dauran Khan was not, as a matter of fact, the
last male owner, but his son, Khan Beg, actually came into
possession before his death. The Lower Court has dismissed
the claim on the ground that in *tahsil* Mianwali daughters and
sisters can only be excluded from inheritance of their fathers
or brothers by collaterals not more remote than the sixth degree,
and that the plaintiffs are not in fact related to the last male
owner, Khan Beg, within the sixth degree.

This contention is practically accepted by both sides and
I see no reason to doubt its correctness.

The sole question which is left for my decision is, how is
the relationship of the collaterals of the deceased Khan Beg
to be calculated? There can be no doubt that the general rule
throughout the Punjab for such calculation must be held to
be that laid down in various judgments of this Court, *inter
alia*, No. 126 of 1890 (*Ladhu v. Mussammat Daulati*) (1),
No. 106 of 1892 (*Nur Muhammad v. Ghulam Habib*) (2),
and No. 74 of 1906 (F. B.) (*Karim Bakhsh v. Jehandad
Khan*) (3). No doubt it is possible that this rule is not
quite universal, as has been supposed, but that it is general
there can be little doubt, and the presumption in every case
must be in favour of it. If that rule be applied, which is
that the calculation must be made from the deceased to the

(1) 126 P. R. 1890.
(2) 106 P. R. 1892.

(3) 74 P. R. 1906 (F. B.).
(4) 48 P. R. 1908.

common ancestor of the claimants, the deceased and the ancestor being each counted as one, then the plaintiffs' suit must fail, as this would show the collaterals as only related in the seventh degree. The collaterals, however, claim that the proper method of calculation in the Mianwali *tahsil* is the same as that laid down in the *Rivaj-i-am* of the Bannu *tahsil*, i.e. the calculation must be made from the collaterals claiming to the common ancestor, each counting as one, and not from the deceased to the common ancestor. If that were so, the plaintiffs' suit will succeed, as they will then be shown within the sixth degree. Plaintiffs rely mainly upon a Division Bench judgment of this Court, reported as No. 48 of 1908 (*Girdhari Ram v. Faizullah Khan*) (1). That undoubtedly lays down that under the provisions of the *Rivaj-i-am* of the Bannu *tahsil*, which they considered might be also applied to the Isa Khel *tahsil*, the method of calculation put forward by the plaintiffs is correct. But this judgment deals with a special part of the country and lays down a rule on the strength of a special entry in the *Rivaj-i-am* of that tract. The question therefore is, are we to apply to Mianwali the general rule obtaining throughout the Punjab, or the rule found to obtain in Isa Khel and Bannu? The actual evidence that the rule is as laid down by the plaintiffs is not of any particular value and may be neglected. After full consideration I consider that Mianwali, being a cis-Indus *tahsil*, separated by the river Indus from the *tahsils* of Isa Khel and Bannu, and differing very materially from those *tahsils* in character and population, must be presumed to be governed by the general rule of the Punjab. This presumption has not to my mind, been rebutted and there is nothing in the *Rivaj-i-am* of the Mianwali *tahsil* to support the contention of the plaintiffs. I am therefore unable to see any sufficient reason for accepting the appeal. It is accordingly rejected with costs.

Appeal dismissed.

(1) 48 P. R. 1908.

No. 20.

Before Hon. Mr. Justice Rattigan.

PANDIT INDAR NARAIN SHIV PURI—(PLAINTIFF)—
APPELLANT

Versus

PANDIT ONKAR LAL—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1243 of 1909.

Probate and Administration Act, V of 1881, sections 6 and 50 (4)—application for Probate—reasons which alone justify its rejection—Indian Limitation Act, IX of 1908, article 181 not applicable—meaning of testator being of “disposing mind.”

Held, that in proceedings under Act V of 1881, where probate of a will is sought, the Court is bound to grant probate, unless it finds that the will was not executed by the testator or that he was not in a state of mind competent to exercise his testamentary power or that the will was not the testator's own voluntary act, and the Court has no concern with the question whether the will, if proved, will be effectual or valid or whether it can affect certain parts of the property with which it purports to deal.

55 P. R. 1894 (*Mussammat Bali v. Mussammat Hussain Bibi*) (1), *Harmusji Naoraji v. Bai Dhanbaji* (2), and *Barot Parshotam v. Bai Muli* (3) referred to.

Held also, that article 181 of the Indian Limitation Act, 1908 (which corresponds with article 178 of Act XV of 1877) has no application to petitions for probate.

Kashi Chundra Deb v. Gopi Krishna Deb (4) referred to.

Held also, that while the mere execution of a will raises a presumption, that the maker of it knew and approved of its contents, the fact that the testator understood that he was making a will and by it giving the whole of his property to one object of his regard is not sufficient proof that he had a “disposing mind”, he must also have capacity to comprehend the nature of the claim of others whom by his will he is excluding from all participation in his property.

Woomesh Chunder Biswas v. Rash Mohini Dassi (5), *Harwood v. Baker* (6), and *Safton v. Hopwood* (7) referred to.

Held further, that when a will was made by a dying woman practically at death's door, behind the back and to the detriment of *careator* (who was one of the legal heirs) and apparently under the influence of a person who was adverse to the *careator*, the *onus* of proving that the testatrix had in fact a “disposing mind” rested upon the propounder.

55 P. R. 1894 (*Mussammat Bali v. Mussammat Hussain Bibi*) (note) (1) referred to.

(1) 55 P. R. 1894.

(2) (1887) I. L. R. 12 Bom. 164.

(3) (1893) I. L. R. 18 Bom. 749.

(4) (1891) I. L. R. 19 Cal. 48.

(5) (1893) I. L. R. 21 Cal. 279.

(6) 3 M. P. C. 282.

(7) 1 F. and F. 179.

Appeal from the order of J. Addison, Esquire, I. C. S., District Judge, Delhi District, dated the 23rd August 1909.

Govind Das, for appellants.

Shadi Lal, for respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—On the 17th August 1907 Pandit Indar Narain applied, as one of the executors, for probate of part of the will executed by Mussammat Indrani on the 18th August 1903. The applicant desired probate only in respect of an item of Rs. 3,800 which was in deposit with the Delhi and London Bank. His application was rejected by order, dated 25th January 1908, on the ground that a limited probate of the kind asked for could not be granted. He thereupon applied for probate of the will as a whole, and a *caveat* was entered against the grant by the present respondent, Pandit Onkar Lal, who objected to the grant of probate on two grounds, (1) that the testatrix had not “a disposing mind” at the time when the will was executed; and (2) that probate would be of no effect in view of the fact that in a previous suit brought by the objector, to which the beneficiary under the will (Radhe Nath, a minor) was a party, it was held by this Court, on the 12th April 1907, that the said will could not affect the right of the objector to half of the estate left by the husband of the testatrix. 18th April 1911.

The District Judge has found that the will was duly executed by Mussammat Indrani, but that “there is room for considerable doubt as to whether the Mussammat, who was dying, properly understood what was going on and freely and of her own accord wished to dispose of the property in the manner described.” He has, however, rejected the application not so much upon that ground, as upon the second objection. He holds that as this Court has declared the will to be void a Court of probate is justified in refusing to grant probate inasmuch as under section 50 (4) of Act V of 1881 the grant, if made prior to that declaration, would have become useless and inoperative, and that consequently it would be useless to grant probate in circumstances which render that grant practically inoperative. Pandit Indar Narain has appealed to this Court.

In my opinion, the learned District Judge erred in refusing to grant probate on the ground upon which his order is based. In proceedings under Act V of 1881 where probate of a will is sought, the Court is bound to grant probate unless it finds that the will was not executed by the testator or that he was

not in a state of mind competent to exercise his testamentary powers or that the will was not the testator's own voluntary act. The Court has no concern with the questions whether the will, if proved, will be effectual or valid, or whether it can affect certain parts of the property with which it purports to deal. As remarked by Sir Meredyth Plowden, in No. 55 *P. R.* 1894 (*Mussammat Bali v. Mussammat Husain Bibi*) (1) "a Court acting under Act V of 1881 is a Court exercising a special jurisdiction, and the proceeding is of a special character even when it is a contentions proceeding and is quite distinct from a suit in a Civil Court to cause or prevent a will from being operative as a disposition of property. It is a preliminary proceeding to determine whether the whole document propounded, or any, and if so what, part of it, is the will of the testator" (cf. also *Harnusji Naoroji v. Bai Dhanbaji* (2) and *Barot Parshotam v. Bai Muli* (3).

In the present case, therefore, the mere fact that the will, if proved, might in view of the decree of this Court in the former suit, have proved ineffectual, was no ground for refusing to grant probate, nor was the Court competent to consider the question whether the will was a valid disposition of property by the testatrix. The District Judge consequently erred in rejecting the petition for probate upon this ground.

Mr. Shadi Lal argued, however, that the order was right in effect, and supported it on the grounds (1) that the petition was barred by time under article 181 of the present Limitation Act, and (2) that the testatrix had "no disposing mind" at the time when she executed the will.

The first of those grounds is untenable, as it is abundantly established that the provisions of article 181 (which correspond with article 178 of Act XV of 1877) have no application to petitions for probate, (see *Kashi Chundra Deb v. Gopi Krishna Deb* (4) and cases there cited). I have no hesitation, therefore, in holding both upon authority and principle that the petition was not barred by limitation. The second ground is one of more difficulty. Upon the evidence given in this case, read with the evidence given in the previous suit, there can be no doubt that Mussammat Indrani executed the will and that she knew that she was executing a will. It is true that she was at the time on her death-bed and that she actually died within a few hours of the execution of the will. It is also a fact that she was, to all intents and purposes, unable to speak.

(1) 55 *P. R.* 1894.

(2) (1887) *I. L. R.* 12 *Bom.* 164.

(3) (1893) *I. L. R.* 18 *Bom.* 749.

(4) (1891) *I. L. R.* 19 *Cal.* 48.

But it is clear from the evidence of Pandit Hari Kishen Kaul, a Government servant of high standing and unimpeachable character, that she was well aware of the fact that she was making her will, and the other witness, Dwarka Nath, fully corroborates him in this respect.

I did not understand Mr. Shadi Lal to seriously dispute the facts, that the testatrix actually executed the will in question and that she was cognisant of the nature of her act. As I understood the learned Advocate's argument, his contention was that the lady though partially sensible did not comprehend the full extent and consequences of her act, and that she was disposing of property in favour of one heir and to the prejudice of another heir equally entitled thereto.

Now it is well established that while the mere execution of a will raises a presumption that the maker of it knew and approved of its contents, *Woomesh Chunder Biswas v. Rash Mohini Dassi* (1). The fact that the testator understood that he was making a will and by it giving the whole of his property to one object of his regard is not sufficient proof that he had "a disposing mind," as their Lordships of the Privy Council observed in the case of *Harwood v. Baker* (2), "he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his will, he is excluding from all participation in his property." Or in the words of Cresswell, J. in *Safton v. Hopwood* (3):—"It is not sufficient in order to make a will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called 'a disposing mind'; he must be able to dispose of his property with understanding and reason. This does not mean that he should make what other people may think a sensible will or a reasonable will or a kind will.....But he must be able to understand his position; he must be able to appreciate his property, to form a judgment with respect to the parties whom he chooses to benefit by it after his death, and if he has capacity for that, it suffices."

Mr. Shadi Lal contends that viewed in the light of the above *dicta*, the will of Mussammat Indrani cannot be held to be the will of a person who had full testamentary capacity. It is not now denied that but for the will, Pandit Onkar Lal, the

(1) (1893) *I. L. R.* 21 Cal. 279.(2) 3 *M. P. C.* 282.(3) 1 *F. and F.* 179.

caveator, would have been entitled to one-half of the property ; that Mussammat Indrani had been very ill for about one year before her death ; that the will was executed within a few hours of her death, and that at the time when it was executed, she was practically unable to speak and had to communicate her wishes by signs. It is also in evidence that the child, Radhe Nath, to whom she bequeathed everything was certainly not adopted more than a few days before her death, indeed, in previous litigation it was held by this Court that he was not adopted until after the death of the testatrix. And finally, it is not denied that Pandit Janki Nath, who is not friendly with the *caveator*, had a great deal to do with the drawing up of the will and was present during the whole time when Pandit Dwarka Nath and Pandit Hari Kishen Kaul saw the lady. Taking all these facts into consideration I am of opinion that Mussammat Indrani, though she may have been aware of the fact that she was executing a will, had not sufficient understanding to comprehend the extent and consequences of her act, and that by this will she was depriving one of the heirs of all participation in the property. So far as I can see, she had no reason to favour the child, Radhe Nath to the prejudice of Pandit Onkar Lal, and in this connection the facts, that the will was actually drawn up (as found by the District Judge in the former case) by Pandit Janki Nath, who is adverse to the *caveator*, and that Pandit Janki Nath apparently never left the room, when the lady was dying, during the time when the witnesses were called to attest the will, are I think, important as showing that the dying woman had really no free and independent volition in the matter. While, therefore, I agree with the District Judge that the testatrix did in one sense signify her assent to the will in the presence of the 2 witnesses and that they both thought that she understood what she was doing, I do not think (and it is clear that the District Judge was of the same opinion) that she really knew and understood, the full consequences of her act. The will is "inofficious ;" it was made behind the back, and to the detriment of, the *caveator*, who is one of the legal heirs, and it was made practically at death's door. In the circumstances I think that the *onus* of proving affirmatively that the testatrix had in fact "a disposing mind" rested upon the propounder of the will, see No. 55 P. R. 1894, Note (*Mussammat Bali v. Mussammat Hussain Bibi*) (1). In arriving at this conclusion, I have not been able to

lose sight of the significant facts that application for probate was not made until after the expiry of 4 years from the date of the testatrix's death, and that it is one only of the two surviving executors named in the will who asks for probate, the other executor declining to take action in the matter. I hold, therefore, though upon different grounds, that the petition for probate was rightly refused and I accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 21.

Before Hon. Mr. Justice Rattigan.

PIARE LAL—(DEFENDANT)—APPELLANT,

Versus

RAM CHAND—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 780 of 1910.

Hindu Law—Mitakshara—applicable in Punjab—alienation of his share in joint Hindu family by one co-parcener—maintainability of suit by other co-parceners for annulment of the alienation—Jurisdictional value of suit, to have a mortgage of half share in houses declared null and void.

Held, that the jurisdictional value of a suit to have a mortgage on half share of two houses declared null and void is the amount of the mortgage money and not the market value of the property mortgaged.

Held also that, according to the *mitakshara* as applied in Bengal and the Punjab, one sharer has no authority without the consent of his co-sharers to dispose of his undivided share in joint Hindu family property in order to raise money on his own account and not for the benefit of the family, and therefore if a co-parcener makes such an alienation by way of gift, mortgage, sale, etc., the other members have the right to sue for the entire annulment of the same.

Sadabart Prasad v. Foolbush Koer (1), 153 P. R. 1883 (*Banke Rai v. Madho Ram*) (2), *Rama Nand v. Gobind Singh* (3), and *Gopal Lal v. Muhadeo Prasad* (4), referred to.

Provided that they must make good to the alienee the amount he had paid, so far as that amount has benefitted them either by entering into the joint assets or from having been applied in paying off charges upon the property which would have been a lien upon it in his hands.

Held, further that such annulment will not affect the personal liability of the co-parcener, who made the alienation.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 11th April 1910.

Suraj Narain and Balwant Rai, for appellant.

Shadi Lal and Fazl-i-Elahi, for respondent.

(1) (1869) 3 B. L. R. 31 (F. B.).
(2) 153 P. R. 1883.

(3) (1883) I. L. R. 5 All. 384.
(4) (1902) 6 Cal. W. N. 651.

The judgment of the learned Judge was as follows :—

22nd July 1911.

RATTIGAN, J.—Plaintiff, Ram Chand, and his son, Jagan Nath (defendant No. 2) are Brahmins of Delhi and members of a joint Hindu family. Very shortly after Jagan Nath attained the age of majority (18), he was introduced to defendant No. 1, Piare Lal, who apparently was ready to accommodate the youth with loans of money. Jagan Nath was as ready to receive money and the result was that between the 18th June 1908 and the 26th November 1908 he executed no less than six promissory notes for a total alleged consideration of Rs. 1,800.

On the 4th December 1908 Jagan Nath executed a duly registered mortgage-deed, in favour of Piare Lal, in respect of his share in two houses. The consideration for this mortgage was stated to be Rs. 2,000 and was made up (1) of the sum of Rs. 1,800, due on the said promissory notes, and (2) of a sum of Rs. 200 paid to the mortgagor before the Sub-Registrar.

On the 1st April 1909, Ram Chand instituted the present suit with the object of having the said mortgage-deed declared null and void, on the grounds that it was executed without consideration and necessity, and was *ultra vires* and illegal as Jagan Nath had no legal right to mortgage his share as a co-parcener in the joint property.

Both the Additional District Judge and the Divisional Judge, on appeal, have accepted plaintiff's contentions and have given him a decree to the effect that the mortgage-deed in suit is null and void.

Piare Lal has preferred a further appeal to this Court, but Mr. Shadi Lal, for respondents, raises the preliminary objection that no such appeal lies as the suit is unclassified and below the value of Rs. 2,500. I have heard arguments upon this point and after consideration I think the objection must prevail. It is true that in the plaint the value for jurisdictional purposes was put down as Rs. 4,000, as that was the market value of the half share in the two houses. But this was clearly a mistake, as the value of the suit is obviously not the value of that half share but of defendant's rights in the houses as mortgagee. All that plaintiff asks for is the cancellation of the mortgage and the consideration for the mortgage was Rs. 2,000. By paying this sum to the mortgagee the plaintiff could release the property from the mortgage charge and I cannot see how the fact that the houses are valued, as a whole, at Rs. 8,000 can affect the question of the value of

the suit. I might note that if the plaintiff in his plaint stated the jurisdictional value to be Rs. 4,000, defendant in ground No. XI of his grounds of appeal has fixed the value (quite rightly) at Rs. 2,000.

I hold, therefore, that no further appeal lies of right in the case, but as an important question of law is involved I admit the memo. of appeal as an application under section 70 (1) (b) of the Punjab Courts Act. The only result of this is that I am not at liberty to question the lower Court's findings on fact and must accept it as established that neither consideration nor necessity is proved in respect of the mortgage. I might, however, add that defendant, Piare Lal, has not much to complain of as regards this result, as even if a further appeal had been competent I should have had no hesitation in agreeing with the lower Courts that necessity had not been proved at all, and that there was no proof that any thing like the alleged amount of consideration had passed. It is, I think, abundantly clear from the defendant's own evidence that he deliberately took advantage of the youth and inexperience of Jagan Nath to get the latter to execute the six promissory notes and the mortgage. Jagan Nath was at the time only eighteen years of age; he was living with his father, and I feel sure that defendant was perfectly well aware that the sums advanced to the boy were not needed for "household purposes."

As, however, no further appeal lies of right, I need not discuss this question, as both Courts are agreed that consideration and necessity have not been proved. The one and only question which I have to decide is whether it was open to Ram Chand to sue for the cancellation of the mortgage-deed. It is conceded that it would have been competent for him to sue for a declaration that the mortgage should not affect his present or future rights in the mortgaged property, but it is contended that it is not competent to him to ask for the cancellation of the mortgage-deed in its entirety.

This contention would have been sound according to the principles of Hindu Law as administered in Madras and Bombay where it is recognized that an alienation by one member of a joint family is valid to the extent of the alienor's own interest in the property. Hence, as observed by Mayne, "no suit could be maintained for the *absolute cancellation* of such an alienation, "still less for the recovery of the whole property, on the ground "that the illegal alienation by the father or other member "had given the plaintiff the right to seek possession for himself," (paragragh 365, "Hindu Law"). But this is not the

law of the *mitakshara* as applied in Bengal and the Punjab. "The theory of the *mitakshara*" says Mayne, "is clearly against such a right.....under that law all the co-parceners are joint owners of the property but only as members of a corporation in which there are shareholders but no shares.....No one has any share until partition, because until then it is impossible to say what the share of each may be; it will be larger one day when a member dies, smaller the next, when a member is born," (paragraph 353). It was consequently held by a Full Bench of the Calcutta High Court in *Sadabart Prasad v. Foolbash Koer* (1), a case which has ever since been accepted as conclusive authority, that in cases governed by the *mitakshara* law, one sharer has no authority without the consent of his co-sharers, to dispose of his undivided share in order to raise money on his own account and not for the benefit of the family, cf. also No. 153 P. R. 1883 (*Banke Rai v. Madho Ram*) (2). If, therefore, a co-parcener governed by the principles of the *mitakshara* law as applied in Bengal and in this Province, disposes of his so-called share by gift, mortgage, sale, etc., the other members have the right to sue for the entire annulment of such alienation (Mayne p. 365). It was on this ground that in a case very similar to the present, the High Court of Allahabad held, that it was competent to a member of the joint family to have a mortgage, effected by another member of his share in the joint and undivided property, set aside, *Rama Nand v. Gobind Singh* (3) (cf. also *Gopal Lal v. Mahadeo Prasad*) (4). Of course "it does not follow that any member of the family can set aside such alienations unconditionally. The rule is that the party setting aside the sale must make good to the purchaser the amount he has paid, so far as that amount has benefitted himself, either by entering into the joint assets or from having been applied in paying off charges upon the property which would have been a lien upon it in his hands," (Mayne's Hindu Law, paragraph 366). In the present case, however, no such equity in favour of the mortgagee arises, as it has been proved that the consideration, if paid at all, is not shown to have entered the joint assets or to have been applied for the purposes of the family or to relieve the property from debts charged upon it. On the contrary, the finding is, that consideration has not been proved and that there was no "necessity" in any event for the borrowing of the money.

(1) (1869) 3 B. L. R. 31 (F. B.).

(2) 153 P. R. 1883.

(3) (1883) I. L. R. 5 All. 384.

(4) (1902) 6 Cal. W. N. 651.

I agree, therefore, with the Lower Courts that plaintiff is entitled to have the mortgage set aside *as a mortgage*. Mr. Shadi Lal admits that the deed cannot at the suit of Ram Chand be cancelled in so far as it provides for the *personal* liability of Jagan Nath and obviously this admission is correct. While therefore the deed is cancelled in so far as it purports to affect any part of the joint property, it still remains operative as a bond so far as Jagan Nath is personally concerned. I therefore so far accept the appeal as to direct that the decree of the Lower Appellate Court be varied to this extent, *viz.*, that it be directed that the deed of mortgage, dated 4th December 1908, be declared null and void as a deed of mortgage, but that nothing in this declaration shall be deemed to affect the operation of such deed so far as the defendant Jagan Nath personally is concerned. In all other respects, the appeal is dismissed and the appellant, who has substantially failed in his appeal must pay the costs of plaintiff in this Court and in the Courts below.

Appeal rejected.

No. 22.

Before Hon. Mr. Justice Johnstone.

MOTI SINGH—(PLAINTIFF)—APPELLANT,

Versus

MAGHAR AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 124 of 1910.

Indian Limitation Act, IX of 1908, section 14—meaning of words “defect of jurisdiction.”

Plaintiff sued for pre-emption and he was directed to deposit a certain sum in advance. He failed to do so and the suit was, therefore, dismissed. He appealed against this dismissal and his appeal was rejected as incompetent. He then petitioned the first Court for restoration and his petition was rejected as time barred. On appeal the Divisional Judge held that plaintiff was entitled to a deduction, under section 14, Limitation Act, of the time he spent in prosecuting his previous appeal.

Held, that the words “defect of jurisdiction” in section 14, Limitation Act, mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken and do not cover such mistakes as the presentation and prosecution of an appeal which did not lie at all in any Court.

63 P. R. 1886 (*Sheoji Ram v. Shco Chand*) (1), 45 P. R. 1893 (*Sultan v. Ala Bakhsh*) (2), 34 P. R. 1898 (*H. H. Raja of Faridkote v. Sardar Gurdyal Singh*) (3), and 121 P. R. 1907 (F. B.) (*Kanhaya Lal v. The National Bank of India*) (4), referred to.

(1) 63 P. R. 1886.
(2) 45 P. R. 1893.

(3) 34 P. R. 1898
(4) 121 P. R. 1907 (F. B.).

Further appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot Division, dated the 10th December 1909.

Tek Chaud, for appellant.

Harris, for respondents.

The judgment of the learned Judge was as follows :—

10th August 1911. JOHNSTONE, J.—This was a pre-emption suit, the property in suit being land valued in the sale-deed at Rs. 2,000 and the plaintiff offering Rs. 650 or any other price which the Court might fix. According to law plaintiff was directed to deposit a certain sum in advance. He did not do this. An extension of time was given to a certain date, on which he failed to put in an appearance and also failed to pay in any money. The suit was, therefore, dismissed. An appeal was preferred against this dismissal of the suit ; it was rejected as incompetent. A petition for restoration of the case was then filed in the first Court ; it was rejected as time-barred. The Divisional Judge, however, on appeal being made to him, held that plaintiff was entitled to a deduction, under section 14 of the Indian Limitation Act, of the time that he had spent in prosecution of his appeal aforesaid. Therefore, the Divisional Judge accepted the appeal and remanded the case for retrial on the merits. The defendant-vendee now files a further appeal in this Court taking three points :—

- (1) that as the value of the land, according to the thirty times *jama* rule, was Rs. 11,250, therefore, according to 46 P. R. 1908 (*Fata v. Khan Bahadur*) (1), the value of the suit for purposes of jurisdiction was beyond the appellate jurisdictional powers of a Divisional Judge ;
- (2) that the plaintiff could not have the benefit of section 14 of the Limitation Act ; and
- (3) that the Lower Appellate Court should have remanded, not the whole case for decision on the merits, but only the application for restoration, for which, the appellant adds, there was no sufficient ground.

It is not necessary to deal with the last point, for it seems to me clear that on both the first and second points taken, the appeal must succeed. It is obvious that the Divisional Judge had no jurisdiction to hear the appeal.

And as regards the second point, after considering 63 *P. R.* 1886 (*Sheoji Ram v. Sheo Chand*) (1), 45 *P. R.* 1893 (*Sultan v. Ala Bakhsh*) (2), and 34 *P. R.* 1898 (*H. H. Raja of Faridkote v. Sardar Gurdial Singh*) (3), it seems to me that I must adopt the principle that the words "defect of jurisdiction" in section 14 aforesaid mean a defect of jurisdiction peculiar to the Court in which the proceedings were taken, and do not cover such mistakes as the presentation and prosecution of an appeal, which did not lie at all in *any Court*. Here it is quite obvious that no appeal lay against the dismissal for default—(See 121 *P. R.* 1907 (*F. B.*) (*Kanhaya Lal v. The National Bank of India*) (4). This ruling was published some two years before plaintiff preferred his incompetent appeal, and therefore, it can hardly be said that his mistake of law was even *bonâ fide*. Mr. Harris points to several rulings of High Courts in which section 14 of the Indian Limitation Act was allowed to be taken advantage of in cases of *bonâ fide* mistake of law, *i.e.*, where a question of law was doubtful, the Courts were willing to stretch a point and to allow a plaintiff to take advantage of section 14. But here, as I have shewn, there ought to have been no doubt whatever in the mind of the plaintiff.

For these reasons, I must accept this appeal and confirm the rejection by the first Court of the petition for restoration. In the circumstances I think that the parties should bear their own costs.

Appeal accepted.

No. 23.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

RUGHNATH DAS—(PLAINTIFF)—APPELLANT

Versus

RAHIMAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1007 of 1909.

Punjab Tenancy Act, XVI of 1887, section 53—sale of occupancy holding to landlord—right of mortgagee, who is dissatisfied with amount of mortgage money fixed by Revenue officer, to bring suit for a declaration—Specific Relief Act, I of 1877, section 42.

Held, that where an occupancy holding is sold to the landlord under the provisions of section 53 of the Punjab Tenancy Act, the tenancy becomes

(1) 63 *P. R.* 1886.

(2) 45 *P. R.* 1893.

(3) 34 *P. R.* 1898.

(4) 121 *P. R.* 1907 (*F. B.*).

extinct and the land passes to the landlord unincumbered by any mortgage created by the tenant, the mortgage-debt, if any, becoming a charge upon the purchase money.

Held also, that where the amount of the mortgage charge is in dispute and the Revenue officer has decided in favour of the mortgagor, the mortgagee is entitled to bring a suit under section 42 of the Specific Relief Act for a declaration in regard to the sum claimed by him to be due under his mortgage.

Further appeal from the order of T. P. Ellis, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 25th May 1909.

Govind Das, for appellant.

Duni Chand, for respondents.

The judgment of the Court was delivered by—

28th Nov. 1911.

SHAH DIN, J.—The facts of this case are briefly as follows :—Rahiman occupancy tenant of 174 *kanals* 3 *marlas* of land, mortgaged it to one Buta Mal for Rs. 1,800. Thereafter, on the 4th January 1900, he mortgaged one-fourth share of the same area to the plaintiff Rughnath Das for Rs. 600. Of this sum Rs. 450 was to carry no interest, there being a stipulation to the effect that the interest on that sum was to be counter-balanced by the produce of the mortgaged land. The balance, Rs. 150, was to carry interest at the rate of 2 *per cent. per mensem*. The plaintiff paid Rs. 450 to Buta Mal and redeemed one-fourth share of the entire area 174 *kanals* 3 *marlas*. The occupancy tenant Rahiman then sold the entire holding to Sukh Ram for a sum of Rs. 4,500, and thereafter Sukh Ram, who intended to sell three-fourths of the same land, got a notice issued to the landlords under section 53 of the Punjab Tenancy Act, giving them the option to purchase the share in question. Three of the landlords accepted the offer, and on an application made by them to a Revenue officer to fix the value of the land under sub-section (3) of section 53 aforesaid the Revenue officer fixed the value at Rs. 3,375 which sum was duly paid by the landlords to the Revenue officer within the appointed time. As the plaintiff had a charge on the land in respect of his mortgage, the Revenue officer had to ascertain the amount of the mortgage-debt due to him. The mortgagor, Rahiman, stated that the amount so due was only Rs. 450 while the mortgagee (the present plaintiff) said that a sum of Rs. 1,356 was due to him on the footing of the mortgage. The Revenue officer accepted the statement of the mortgagor and decided that the amount of the mortgage-debt, in respect of which the mortgagee had a charge on the purchase money paid by the landlords, was only Rs. 306.

The suit out of which the present appeal has arisen was brought by the mortgagee, Rughnath Das, on the 7th August 1908, for a declaration to the effect that the amount of the mortgage-debt due to him under the mortgage of the 4th January 1900, was Rs. 1,356 and that this amount was a charge on one-fourth share of 174 *kanals* 3 *marlas*, and to this suit he impleaded, as defendants, Rahiman, the original mortgagor and Sukh Ram, the vendee from Rahiman; but subsequently the three landlords who had purchased the occupancy rights under section 53 of the Tenancy Act, and the sons of Buta Mal, who had obtained a mortgage from Rahiman of his entire holding and from whom the plaintiff had redeemed the one-fourth share of the land, were added as defendants. The suit was decided on the merits, and the first Court gave a decree in favour of the plaintiff declaring that a sum of Rs. 1,356 was due to the plaintiff under the mortgage of the 4th January 1900, and that the said sum shall be a charge on the mortgaged property.

On appeal, the Additional Divisional Judge, without going into the merits of the case, held that no suit for a declaration of the kind asked for by the plaintiff could lie under section 42 of the Specific Relief Act, inasmuch as, in his opinion, no cause of action had been disclosed by the plaintiff, and also because the amount due to the plaintiff under the mortgage will have to be ascertained at the time when the mortgage is sought to be redeemed. The learned Judge therefore dismissed the suit.

After hearing arguments, we are of opinion that the view taken by the Additional Divisional Judge is erroneous and that the case must be sent back for decision on the merits. It is quite clear that, under the circumstances stated at the commencement of this judgment, as soon as the landlords purchased the occupancy rights under section 53 of the Tenancy Act at the value fixed by the Revenue officer, both the rights of occupancy and the mortgage rights, created by the occupancy tenant in favour of the plaintiff under the mortgage of the 4th January 1900, became extinct, and therefore no question of redemption of the mortgage in question can arise in future and the landlords will have no need to institute any suit for redemption. It is equally clear that the plaintiff has a good cause of action, inasmuch as the Revenue officer had to ascertain, under sub-section 9 of section 53 of the Act, the amount of the mortgage-debt due to the plaintiff under his mortgage which was a charge on the purchase money under sub-section 7 of the said section and which the Revenue officer had to pay to him, and because the Revenue officer decided against

the plaintiff that his charge on the purchase money amounted to Rs. 306, and not Rs. 1,356 as claimed by him. It is difficult to see in what other form the plaintiff could have brought his suit except a declaratory suit under section 42 of the Specific Relief Act, for in view of the provisions of Section 53 of the Tenancy Act, no further relief was open to him, such as would preclude a suit for a mere declaration.

Another objection, urged by the pleader for the plaintiff-appellant to the decision of the Lower Appellate Court, is that neither in the Court of first instance nor in the grounds of appeal in the Lower Appellate Court did the defendant-respondent Sukh Ram plead that the suit as framed was barred by section 42 of the Specific Relief Act; and it is urged on the authority of *Limba Bin Krishna v. Rama Bin Pimplu* (1) and *Chomu v. Umma* (2) that the Lower Appellate Court should not have dismissed the suit on the ground of its being one asking for a mere declaratory decree and no consequence of relief. We think that this contention has much force. The objection of the bar by section 42 appears to have been raised by the Additional Divisional Judge *suo motu*; and in our opinion, as the objection was not raised by the defendant-respondent, Sukh Ram, at any stage of the case, the suit should not have been thrown out on that ground.

For the reasons given, we accept this appeal, and, setting aside the decree of the Lower Appellate Court, we remand the case to it, under order XLI, rule 23, Civil Procedure Code, for decision on the merits. The stamp on appeal will be refunded and other costs shall be costs in the cause.

Case remanded.

No. 24.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and
Hon. Mr. Justice Rattigan.*

HAZARA SINGH AND ANOTHER—(PLAINTIFFS)—
APPELLANTS

Versus

HARNAM SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1120 of 1910.

*Custom—Alienation—status of remote collaterals (next in succession) to
contest alienations of ancestral property.*

Held, that collaterals in the 11th degree (though next in succession) have
no right to contest alienations of ancestral property in the absence of proof of

(1) (1888) *I. L. R.* 13 *Bom.* 518.

(2) (1890) *I. L. R.* 14 *Mad.* 46.

a special custom, entitling them to deprive the alienor of the right to select his own successor or representative in estate.

119 P. R. 1883 (*Muhammad v. Jahan Khan*) (1), 69 P. R. 1887 (*Dula Singh v. Wazir Singh*) (2), 107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*) (3), 20 P. R. 1890 (*Mangal v. Chetu*) (4), 79 P. R. 1891 (*Ala Bakhsh v. Buta*) (5), 50 P. R. 1893 (F. B.) (*Ralla v. Budha*) (6), 75 P. R. 1898 (*Arur Singh v. Mus-sammat Lachmi*) (7), 35 P. R. 1906 (*Khazan Singh v. Relu*) (8), 93 P. R. 1906 (*Natha Singh v. Mohan Singh*) (9), 23 P. R. 1907 (*Uira Singh v. Karam Singh*) (10), 162 P. L. R. 1901 (*Sawan Singh v. Harnaman*) (11), and 94 P. L. R. 1903 (*Hardas Singh v. Buta*) (12), referred to.

Further appeal from the order of H. Harcourt, Esquire, Divisional Judge, Jullundur, dated the 3rd August 1910.

Sheo Narain and Dharm Chand, for appellants.

Sohan Lal, for respondents.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This appeal and 1121 of 1910 can be disposed of together, the two suits having been dismissed on the appeal of the defendants by the Lower Appellate Court on the ground that the plaintiffs, collaterals in the 11th degree of a mortgagor, had no right to control his alienation of his ancestral property. 30th Nov. 1911.

The authorities cited on either side are—

119 P. R. 1883 (*Muhammad v. Jahan Khan*) (1), in which it was held that no well established rule, permitting male collaterals in the tenth degree from a deceased proprietor to contest an alienation by his widow to his sister's son, prevailed among Muhammadan Jats of Gujar Khan *tahsil*, Rawalpindi.

69 P. R. 1887 (*Dula Singh v. Wazir Singh*) (2), in which it was held that the collaterals in the tenth degree of a childless Jat landowner of the Batala *tahsil*, Gurdaspur, had not discharged the burden of proving that they could control his power of alienating ancestral property.

Powell J. said "a very remote relation may be entitled to the succession rather than that the property should escheat; but it is a well recognized rule that relations, at any rate beyond the fifth or, possibly, sixth or seventh degree, must show that by custom they are entitled to intervene."

107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*) (3) in which Plowden, S. J. said "it has been found as a rule that collaterals beyond the fifth or at most the seventh degree of relationship are not recognized as entitled to control the action of a sonless proprietor in respect of disposition."

(1) 119 P. R. 1883.

(2) 69 P. R. 1887.

(3) 107 P. R. 1887 (F. B.).

(4) 20 P. R. 1890.

(5) 79 P. R. 1891.

(6) 50 P. R. 1893 (F. B.).

(7) 75 P. R. 1898.

(8) 35 P. R. 1906.

(9) 93 P. R. 1906.

(10) 23 P. R. 1907.

(11) 162 P. L. R. 1901.

(12) 94 P. L. R. 1903.

The parties were Sus Jats of the Hoshiarpur District, and it was held that the transferee had not discharged the burden of proving that a grandnephew of the transferor could not contest the transfer.

20 *P. R.* 1890 (*Mangal v. Chetu*) (1), in which it was held that among Bajoah Jats of *mauza* Bahair, *tahsil* Raya, Sialkot, collaterals in the tenth degree could not object to an alienation by a childless proprietor.

79 *P. R.* 1891 (*Ala Bakhsh v. Buta*) (2), in which it was held, following the principle laid down by the Full Bench in 1887, that the burden of proving affirmatively that they were entitled to challenge a sale by a sonless Ghuman Jat of *mauza* Kala, Sialkot *tahsil*, lay on the plaintiffs who had embraced the Muhammadan religion, lived in another village and were collaterals in the eighth degree of the vendor, the vendee being his collateral in the ninth degree, and that they had not discharged the burden.

75 *P. R.* 1898 (*Arur Singh v. Mussammat Lachmi*) (3), in which it was held that among Dhillon Jats of the Lahore District, collaterals in the ninth degree of the alienor could object to an alienation.

The Division Bench said referring to the *dictum* of Plowden, S. J., in 50 *P. R.* 1893 (*F. B.*) (*Ralla v. Budha*) (4) at p. 230 that the rule in favour of control by collaterals of alienation had been recognised thoroughly since the passing of the Full Bench decision in 1887, above cited, and continued: "This being the case" "all agnates who are heirs by virtue of their relationship have" "presumably the right of objecting to any act which injures" "their right of succession and it is difficult to see how an arbitrary line can be drawn in favour of agnates up to a certain" "degree, and those beyond excluded from the benefit of the" "presumption."

35 *P. R.* 1906 (*Khazan Singh v. Relu*) (5), in which it was held that among the agricultural tribes of the Punjab there was no definite limit of propinquity up to which kinsmen are to be presumed to have the right to impeach alienations, without consideration or necessity, of ancestral land by a sonless proprietor, and beyond which they are to be presumed not to have it, and that collaterals in the tenth degree of the alienor had this right.

93 *P. R.* 1906 (*Natha Singh v. Mohan Singh*) (6), in which it was held that the *onus* of proving, that among Ghuman Jats

(1) 20 *P. R.* 1890.
(2) 79 *P. R.* 1891.
(3) 75 *P. R.* 1898.

(4) 50 *P. R.* 1893 (*F. B.*).
(5) 35 *P. R.* 1906.
(6) 93 *P. R.* 1906.

of the Sialkot *tahsil*, collaterals in the eighth degree could contest an alienation by a childless proprietor of his ancestral land, was on the collaterals, who had failed to discharge it. The Division Bench said—"it is not necessary to discuss in detail the instances cited on behalf of the defendants.....They consist of a number of cases in which it was held that collaterals of a higher degree of remoteness were held incapable of suing and their value lies in the fact that they show that a numerical limit beyond which collaterals are not competent to sue is fully recognized.....and they emphasize what has been noted in several rulings of this Court and what is undoubtedly the case, that a right to succeed to an estate after the death of the owner does not necessarily infer the right to control its disposal by that owner during his life time, even under the customary law."

23 *P. R.* 1907 (*Hira v. Karam Kaur* (1), in which it was held that, among Hindu Bhat Jats of the Raya *tahsil*, Sialkot, his collaterals in the eighth degree were not entitled by custom to contest an alienation of ancestral property by a sonless proprietor, as being made without necessity or consideration.

C. A. 431 of 1899, reported as 162 *P. L. R.* 1901 (*Sawan Singh v. Harnaman*) (2), in which it was held, in a case between Jat Sudas of the Jullundur District, that collaterals in the tenth degree had not discharged the burden of establishing their right to control alienations by a childless proprietor.

C. A. 713 of 1900, reported as 94 *P. L. R.* 1903 (*Hardas Singh v. Buta*) (3), in which it was held that among Bajwah Jats of a *tahsil* other than Raya in the Sialkot District, collaterals in the eleventh degree could not interfere with a gift to a maternal uncle.

In some of the cases above cited the provisions of the *Rivaj-i-am* affected the decision, but the weight of authority is, in our opinion, very strongly opposed to the plaintiffs' alleged right to interfere with the alienations in suit, in the absence of evidence of special custom in his favour. It is true that 75 *P. R.* 1893 (*Arur Singh v. Mussammatt Lachmi*) (4), and 35 *P. R.* 1906 (*Khazan Singh v. Relu*) (5) to which Chatterji J., for whose opinion we have very great respect, was a party, indicated a tendency to admit the right of the remotest collaterals to control alienations, but our brother Robertson, a party to the later of these two judgments

(1) 23 *P. R.* 1907.(2) 162 *P. L. R.* 1901.(5) 35 *P. R.* 1906.(3) 94 *P. L. R.* 1903.(4) 75 *P. R.* 1898.

was also a party to 93 P. R. 1906 (*Natha Singh v. Mohan Singh* (1), and 23 P. R. 1907 (*Hira v. Karam Kaur*) (2), above cited.

The authorities confirm us in the opinion that the right to succeed, where escheat is the alternative to succession, is far more extensive than the right to control alienation, and there is, in our opinion, nothing inconsistent in the proposition that a distant collateral, who cannot control alienation, may still have a right superior to the Crown. The mere fact that the property, in respect of which the right of control has been asserted, has descended from the common ancestor of the alienor and the claimant, does not in the absence of evidence of a special custom in favour of the latter entitle him to deprive the alienor of the right to select his successor or representative in estate where the claimant is a very remote relation; the latter succeeds only to so much of the property as has not been disposed of by the alienor. In these cases no special custom has been established or even seriously asserted.

For these reasons we dismiss this appeal with costs.

Appeal dismissed.

No. 25.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

PARTAP SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MUSSAMMAT PANJABU AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 40 of 1910.

Custom—Succession—by daughters to self-acquired property—Gariwal Jats, Ludhiana District—Riwaj-i-am.

Held, that among Gariwal Jats of the Ludhiana District there is a special custom, contrary to general custom, whereby daughters are excluded from succession to self-acquired property by collaterals.

29 P. R. 1911 (*Mussammatt Ishar Kour v. Raja Singh*) (3), followed.

12 P. R. 1901 (*Nawab-ud-Din v. Mussammatt Kami*) (4) and 11 P. R. 1908 (*Rajo v. Karam Bakhsh*) (5), distinguished.

54 P. R. 1906 (p. 209) (*Maula Bakhsh v. Muhammad Bakhsh*) (6), 102 P. R. 1901 (p. 359) (*Rahim Shah v. Hussain Shah*) (7) and 24 P. R. 1893 (p. 131) (*Har Narain v. Mussammatt Deoki*) (8), referred to.

- (1) 93 P. R. 1906.
- (2) 23 P. R. 1907.
- (3) 29 P. R. 1911.
- (4) 12 P. R. 1901.

- (5) 11 P. R. 1908.
- (6) 54 P. R. 1906.
- (7) 102 P. R. 1901.
- (8) 24 P. R. 1893.

Further appeal from the order of T. P. Ellis, Esquire, M.A., I.C.S., Divisional Judge, Ludhiana Division, dated the 1st November 1911.

Lajpat Rai, for appellants.

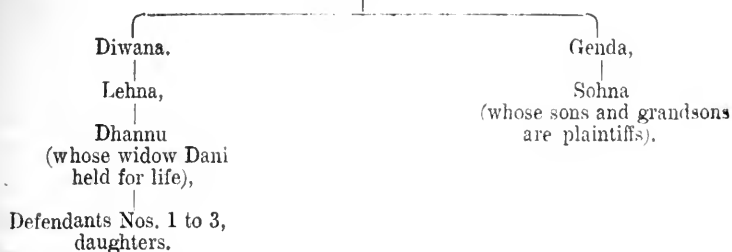
Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—The parties to this case are Gariwal Jats 2nd Decr. 1911.

of *tahsil* Jagraon, District Ludhiana. Plaintiffs as reversioners claim the property left by one Dhannu, while defendants Nos. 1 to 3 are Dhannu's married daughters, as *per* pedigree table:—

JOGI.



The other defendants are (1) ten plaintiffs in a connected case with which we are not now concerned and (2) eight mortgagees of the property.

Plaintiffs claimed by right of inheritance on the contention that among Gariwal Jats of Ludhiana daughters are excluded from inheritance by collaterals in the 4th degree, whether the property is self-acquired or not. [The First Court talks of collaterals in the 10th degree and the Lower Appellate Court of the 5th degree, but clearly plaintiffs are in the 4th degree, Jogi being the common ancestor in *this* case.]

The First Court found that plaintiffs are collaterals of Dhannu as stated above, and this point need not be mentioned again. It then went on to hold that the property in suit was acquired by Diwana and not by Jogi and was therefore not ancestral *quâ* plaintiffs. Lastly remarking that in the Punjab generally daughters succeed to self acquisitions in preference to remote collaterals, the Court expressed the opinion that plaintiffs had proved no special custom to the contrary notwithstanding the entry in their favour in the *Riwaj-i-am*, and that in equity collaterals in the "tenth degree" should not be given preference over daughters in such cases.

The suit having been thus dismissed, plaintiffs appealed to the learned Divisional Judge, who upheld the First Court's decision. He laid the *onus* upon plaintiffs, and this was no doubt right enough; and he proceeded to rule that the *Riwaj-i-am* entry was not sufficient to shift the *onus* and that the one decided

case on the point among these Gariwal Jats namely, Mussammat Ishar Kour v. Raja Singh and others, decided by the District Judge, Ludhiana, in 1908, did not help the plaintiffs.

The plaintiffs have come up here with a further appeal, which we think must succeed. The Lower Appellate Court's judgment was delivered on 1st November 1909, and the appeal against it was laid before a Judge of this Court on 22nd June 1910, who going upon the general custom of the Province in regard to succession of daughters to non-ancestral property, remarked, that if the property was non-ancestral the decision of the Lower Appellate Court was in his opinion correct, but that it might be that after all the property was ancestral. This expression of opinion, of course, does not bind us now, the more especially as the Judge had not the benefit of considering the judgment of this Court (Division Bench) in Mussammat Ishar Kour's case mentioned above, which came up here, on first appeal. Then, after an exhaustive examination of the evidence and a careful local enquiry by a commissioner, it was laid down that, among Gariwal Jats of Ludhiana there was a special custom, contrary to general custom, whereby daughters were excluded by collaterals. In that case the collaterals were related in the third degree, but no stress was laid upon this circumstance, and it is apparent that the conclusion would have been the same, had the degree of the relationship been the fourth. See judgment in *Mussammat Ishar Kour v. Raja Singh* (1), decided on 13th February 1911, and heard on 6th February 1911, five or six months after the case now before us, first came before the Judge in Chambers.

* Really a sister's daughter.

It seems clear to us that we must follow that ruling unless it can be effectually distinguished. Mr. Shafi, besides noticing the difference of one degree in nearness of relationship, takes three points in this connection. First, he points out, that there the collaterals were in possession under a mutation, whereas here the daughters have this advantage; next, that there the plaintiff was not a daughter but a daughter's daughter,* and thirdly, that there the original acquirers were two whole brothers, deceased being descendant of one brother and plaintiff of the other. We cannot see that the first of these points is material except perhaps as regards burden of proof, which we have conceded, lies on plaintiffs; and the facts as regards the third point are precisely the same as the present case. The second point alone thus needs examination.

It is true that the plaintiff in *Mussammat Ishar Kour's* case was a sister's daughter,* but nevertheless the *dictum* that the daughter herself was not entitled to succeed as a full owner was not *obiter*, for it was part of plaintiff's case, strongly urged by her learned counsel Mr. Shafi that she was entitled in preference to the collaterals, *because* her mother was by custom entitled to succeed as a full owner. This made it necessary for this Court to consider and decide the question of the relative rights of a *daughter* and collaterals, and the appeal was decided against the plaintiff expressly on the ground that her mother, even considered as a daughter of a male-holder, was excluded by the collaterals and so *à fortiori* she was herself excluded. The local enquiry and the investigation in Court were all directed to the ascertainment of the rights of daughters of male-holders as such. It is clear, then, that that case cannot be effectually distinguished from the present case.

*i. e. daughter's daughter of the penultimate male-holder.

And we do not think Mr. Shafi has succeeded in showing us that the ruling in that case was unsound. He refers us to section 23 of Rattigan's Digest, but that only states the general custom and here there is, for reasons fully given in the other case, which we need not repeat here, a peculiar special custom followed by this section of Jats. Then he points to the Hindu Law under which a daughter is an heir but a daughter's daughter is not, but we cannot see how this helps matters when

a special custom is proved. Lastly, he quotes a number of rulings (see margin) concerning which we offer the following remarks.

12 P. R. 1901 (*Nawab-ud-din v. Mussammat Kami*) (1).

11 P. R. 1908 (p. 79) (*Rajo v. Karam Bakhsh*) (2).

54 P. R. 1906 (p. 209) (*Maula Bakhsh v. Muhammad Bakhsh*) (3).

102 P. R. 1901 (p. 359) (*Rahim Shah v. Hussain Shah*) (4).

24 P. R. 1893 (p. 131) (*Har Narain v. Mussammat Deoki*) (5).

12 P. R. 1901 (*Nawab-ud-din v. Mussammat Kami*) (1) is a case of Malak Rajputs of Ludhiana city, and a gift to the daughter had been made. No doubt the *Riwaj-i-am* was the same

as that now before us, but here the tribe is different and there was no gift and there the learned Judges do not seem to have noticed the remark at page 40 of Mr. Gordon Walker's Volume on Customary Law in Ludhiana, paragraph 79 to the effect that in such matters no distinction is made between ancestral and self-acquired property.

11 P. R. 1908 (*Rajo v. Karam Bakhsh*) is a case of Rattal Jats of *tahsil* Lahore in which a bequest to a daughter made in presence of collaterals in the eighth degree, was upheld.

(1) 12 P. R. 1901.

(2) 11 P. R. 1908.

(3) 54 P. R. 1906.

(4) 102 P. R. 1901.

(5) 24 P. R. 1893.

The other rulings are quoted in order to bring to our notice the warnings given by several learned Judges in them of the danger in relying too much upon statements of custom made by males to the prejudice of females. We are well aware of the danger; but we do not see how the warnings really affect this case. The ruling, we elect to follow, was based on a large mass of evidence which is not in any way weakened by any consideration of the danger of excessive reliance upon a *Riwaj-i-am*.

For these reasons we accept this appeal and, setting aside the judgments and decrees of the Courts below, we decree plaintiffs' claim, but in view of the facts that the ruling we follow was not delivered until February 1911 and that the case apart from that ruling was a doubtful and difficult one, we direct that the parties do bear their own costs.

Appeal accepted.

No. 26.

Before Hon. Mr. Justice Shah Din.

JIWA—(PLAINTIFF)—APPELLANT,

Versus

BUTA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1348 of 1911.

Punjab Pre-emption Act, II of 1905, sections 3 (1) (3), and 5—Sale of agricultural land, situate in suburb of a town—urban immovable property—effect of buildings erected on it since date of sale.

Held, that under the terms of section 3 (1) and (3) of the Punjab Pre-emption Act, II of 1905, land which at the time of the sale was occupied or let for agricultural purposes or for purposes subservient to agriculture and was not occupied as the site of any building in a town or village, is subject to pre-emption under section 5 of the Act, no matter whether it is situate in a town or in a village.

Held also, that the fact that the land had since the date of the sale been built upon by the vendee, could not alter its character so as to affect the plaintiff's right of pre-emption.

Further appeal from the order of H A. Rose, Esquire, Divisional Judge, Ambala, dated the 18th November 1908.

Muhammad Iqbal, for appellant.

Vishnu Singh, for respondents.

The judgment of the learned Judge was as follows :—

9th Decr. 1911.

SHAH DIN, J.—The facts of this case, so far as they are material to the decision of this appeal, are as follows :—By a registered-deed, dated the 5th of July 1907, defendants Nos. 1 to 4 sold the land in suit, measuring 3 *biswas*, which is

situate in *mauza* Agwar Gujran, a suburb of the town of Jagraon, to defendant No. 5 for Rs. 75. The plaintiff, Jiwa, who is a proprietor in the village in question, brought a suit for pre-emption in respect of the land sold, alleging *inter alia*, that the vendee being a non-proprietor in the village, the plaintiff had a superior right of pre-emption. In answer to the plaintiff's claim the vendee raised several pleas but for the purposes of this appeal it is only necessary to notice one of them, namely, that the land in suit was not agricultural land, that it formed part of the extension of the town of Jagraon, and that therefore the plaintiff had no right of pre-emption in respect of it. On the pleadings of the parties the Court of first instance framed, among others, the following two issues :—

- (1) Is the land in suit agricultural land and situate in the village of Agwar Gujran ?
- (2) Has plaintiff got a preferential right of pre-emption ?

On the above issues the Court found in the negative, and, without going into the other issues raised between the parties, dismissed the suit. The following is a summary of the conclusions recorded by the Court in the concluding part of its judgment on the two issues set forth above :—

- “(1) That *abadi* Agwar Gujran is part of the town of
“ Jagraon and not a separate village ;
- “(2) That since the market has been built, the Agwar
“ Gujran portion of the town is being extended
“ as far as the market and the railway station,
“ and a *bazar* is in the course of formation on the
“ station road ;
- “(3) That a shop for the sale of milk has been built
“ on the land in suit by the vendee ; and
- “(4) That the land is the site of an old part and no
revenue is assessed on it.”

In an earlier part of the judgment, the Court says that the statement of Milkhi Ram, *patwari*, shews that the land in suit is situated in the Mahal Agwar Gujran and is entered in the revenue papers as agricultural land. This part of the *patwari*'s statement has, as we shall presently see, an important bearing on the question whether or not the plaintiff has a right of pre-emption in respect of the land in dispute, but the Court has not given due weight to it with reference to the provisions of the Punjab Pre-emption Act, probably on the ground that

the land is not assessed to revenue and because it forms part of the alleged extension of the town of Jagraon.

On appeal, the Divisional Judge agreed with the first Court in holding that the plaintiff had no right of pre-emption regarding the land in suit. The question which the learned Judge propounded to himself was whether the property in suit could fairly be described as "urban immovable property," and he answered that question in the affirmative. His reasoning can best be described in his own words: "Jagraon town," says the Divisional Judge, "is enclosed by an ancient wall round which lie several Agwars or suburbs, themselves within Municipal limits, though their lands are outside those limits and form separate revenue estates. At a distance of a mile or two from the town lies the *tahsil* and recently the railway station has been built in that direction. The property in suit lies on the main road connecting the town and the station, and, appellant tells me, it is nearer the town than the station. The town has for years shewn a tendency to extend northwards towards the *tahsil* and the Ludhiana-Ferozepore road. This tendency will doubtless be increased by the construction of the railway. The land in dispute is no longer part of the agricultural land of a village, but lies in the suburb of a rising town and has now been built upon by defendant."

It seems to me that in coming to the conclusion that the land in suit is "urban immoveable property" and therefore not subject to the right of pre-emption, the Divisional Judge has overlooked both the statement of the *patwari* in this case and the provisions of the Punjab Pre-emption Act which bear on the question under consideration. Under section 5 of the said Act a right of pre-emption always exists in respect of "agricultural land", though it is subject to all the provisions and limitations contained in the Act; and the question for decision in this case is, not whether the land in dispute is situate in a village or in a town, but whether it is "agricultural land" within the meaning of section 3 (1) of the said Act. According to section 3 "agricultural land" means "land" as defined in the Punjab Alienation of Land Act, 1900, and in that Act the expression "land" means "land which is not occupied as the site of any building in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes * * *" (here follow 5 clauses which it is unnecessary to set out in this place). In subsection (3) of section 3, aforesaid "urban immovable property" is defined as meaning immovable property within the limits

of a town, *other than agricultural land*. With reference to the above definitions, it is clear that if the land in suit is agricultural "land" it is not "urban immovable property" within the meaning of the Punjab Pre-emption Act, no matter whether it is situate in a town or in a village; and the whole discussion in this case as to the recent extensions of the town of Jagraon or as to the probability of its future extension towards the *tahsil* and the railway station is perfectly irrelevant. It is equally clear that if the land in question was at the date of sale and for sometime prior thereto occupied or let for agricultural purposes or for purposes subservient to agriculture, and was not occupied as the site of any building in a town or village, it was "agricultural land" within the meaning of the Pre-emption Act and was therefore subject to pre-emption under section 5 thereof.

On this point the *patwarī's* statement is quite explicit. He says that the land has been cultivated since 1892-1893 and is entered in the revenue papers as *chahi mazrua*. The *fard* attached to the plaint shows that at the last settlement the land was entered as *bara (ghair mumkin)* and no revenue was assessed on it. Since the date of the settlement, however, the land has been brought under the plough, and it is not disputed that it lies outside the Municipal limits of the town of Jagraon and forms part of the revenue paying estate of Agwar Gujran, which contains a large area of agricultural land, part of which is now being sold and utilised as building site. If, then, the land in suit has been occupied for agricultural purposes for no less than fifteen years before suit, and if at the date of sale it was still occupied for the same purpose, it is incorrect to say that for the purposes of the present litigation it is "urban immovable property" simply because at one time it was *ghair mumkin* and is not now assessed to land revenue, or because it lies in the direction of the recent extensions of the town of Jagraon and on the main road connecting the town and the railway station. The fact that since the date of sale it has been built upon by the vendee is not sufficient to alter its character so as to affect the plaintiff's right of pre-emption, for in a case of this kind in determining whether the subject matter of the suit is agricultural land or not the time to be looked at is the time when the sale was made and not when the suit was instituted. Unless and until it is shewn that at the date of sale the land in question had ceased to be agricultural land as defined by section 3 (1) of the Pre-emption Act, the plaintiff must be held to have a right

of pre-emption in respect of it, though obviously he can only exercise it subject to the provisions and limitations contained in the said Act.

It now only remains to point out that the decisions cited in the judgment of the Court of first instance have no bearing whatever on the question under consideration. No. 74 P. R. 1897 (*Kadir Baksh v. Ghulam*) (1), No. 21 P. R. 1906 (*Ram Narain Singh v. Sewak Ram*) (2), No. 22 P. R. 1906 (*Haider v. Ishwar Das*) (3), No. 27 P. R. 1907 (*Ishwar Das v. Duni Chand*) (4) and No. 51 P. R. 1907 (*Harjallu Mal v. Nathu Ram*) (5) were all cases decided under sections 9, 10 and 11 of the Punjab Laws Act, which have been repealed by the Punjab Pre-emption Act; and they are therefore irrelevant to the present enquiry. Here there is no question of whether Agwar Gujran is a village or a town which would have been a question of great importance if section 10 of the Punjab Laws Act had governed the case; the sole question which requires decision in this case, with reference to the provisions of the new Act (II of 1905) is whether the land in suit is "agricultural" land or not, and on that question the decisions cited by the first Court throw no light at all.

Before me the counsel for the vendee also relied on No. 90 P. R. 1907 (*Muhammad Din v. Shah Din*) (6), but that decision is wholly inapplicable to the facts of the present case, inasmuch as there it was admitted that at the time of the sale the land in respect of which the plaintiff had preferred his claim was not agricultural land within the meaning of the Punjab Tenancy Act, 1887. In fact, in that case it was held proved that during the last seventeen or eighteen years the land had been gradually built upon, and that at the date of sale there were some 200 buildings standing on it. Besides, in that case also pre-emption was claimed under the provisions of the Punjab Laws Act, and the claim was adjudicated upon with reference to sections 10, 11 and 12 of the said Act.

For the above reasons, I hold that the land in suit was agricultural land at the date of sale and that the plaintiff has a right of pre-emption in respect of it. I therefore accept this appeal and remand the case under order XLI, rule 23, Civil Procedure Code, to the Court of first instance for decision on the merits. Stamp on this appeal will be refunded and the other costs will be costs in the cause.

Case remanded.

(1) 74 P. R. 1897.
(2) 21 P. R. 1906.
(3) 22 P. R. 1906.

(4) 27 P. R. 1907.
(5) 51 P. R. 1907.
(6) 90 P. R. 1907.

No. 27.

Before Hon. Mr. Justice Johnstone.

SHAHAB-UD-DIN AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

MUSSAMMAT BARKATI AND OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 487 of 1911.

Custom—Succession—chundavand or pagvand—Salahriya Rajputs, mauza Parel, tahsil Zafarwal, district Sialkot—Riwaj-i-am.

Held contrary to the Riwaj-i-am of 1898, that it had been proved that among Salahriya Rajputs of mauza Parel, tahsil Zafarwal, district Sialkot, the customary rule of succession was still the chundavand and not the pagvand rule.

Further appeal from the order of H. Harcourt, Esquire, Divisional Judge, Sialkot, dated the 15th December 1910.

Appellants in person.

Respondents in person.

The judgment of the learned Judge was as follows :—

JOHNSTONE, J.—In this case between Salahriya Rajputs of mauza Parel, tahsil Zafarwal, district Sialkot, the sole question is whether the tribe follow the *chundavand* rule of succession or the *pagvand* rule. The first Court found the latter rule to prevail, but the lower Appellate Court took the opposite view. As the *pagvand* rule is the more general one, and as there seemed to be much to be said on both sides, I admitted the revision as a further appeal under clause (b), section 70 (1), Punjab Courts Act. 20th Decr. 1911.

The parties are unrepresented by counsel, but I have gone carefully through the record and I have arrived at the conclusion that the lower Appellate Court's decision is probably correct.

The first Court says each party called 6 witnesses, but as a matter of fact I have been able to find on the record only three witnesses for plaintiffs and 5 for defendants. Plaintiffs' 3 witnesses give 6 instances of *pagvand* succession, unsupported by documents, and defendants' 5 witnesses give 8 instances of *chundavand* succession. Then plaintiffs produce one mutation, said to be based on a decree, and one judicial decision, dated 27th July 1892, in which the *pagvand* rule was followed. On the other hand defendants point to 5 mutations, all in point, to a judgment not in point; and to two judgments,

dated 24th December 1896, and 2nd November 1890, respectively, also in point ; in all of these instances the *chundavand* rule was followed. In the judgment of 1890 it is noteworthy that 21 respectable witnesses all testified to the rule and supported their opinions by a large number of instances, while in the 1892 case the enquiry was comparatively meagre.

In their plaint plaintiffs asserted that the mutation after their father's death was effected by *chundavand* rule under collusion with the *patwari*, but they have been able to show no indication of fraud of this kind. No doubt the initial *onus*, in view of the general rule and of the *Rivaj-i-am* of 1898, is on defendants, but in my opinion this *onus* has been fully discharged, and defendants have succeeded in showing that as yet the practice in the tribe is division *per stirpe* and not *per capita*.

For these reasons I dismiss the appeal with cost.

Appeal dismissed.

No. 28.

Before Hon. Mr. Justice Chevis.

AZIM KHAN—(PLAINTIFF)—PETITIONER

Versus

MUSTAQIM KHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 1378 of 1911.

Custom—pre-emption—existence of—in town of Umar, at time when Punjab Pre-emption Act, II of 1905 came into force.

Held, that plaintiff had failed to prove that a custom of pre-emption existed in the town of Umar at the time when the Punjab Pre-emption Act, 1905, came into force.

Petition under section 70 (1) (a) and (b) of Act XVIII of 1884 for revision of the order of W. A. LeRossignol, Esquire, Divisional Judge, Hoshiarpur Division, dated the 21st March 1911.

Duni Chand, for petitioner.

Respondent in person.

The judgment of the learned Judge was as follows:—

16th Jan'y. 1912.

CHEVIS, J.—This is a pre-emption suit relating to the town of Umar. The Lower Courts having dismissed the claim, the plaintiff applies for revision.

The question is whether any custom of pre-emption was in existence in Umar at the time of Punjab Act II of 1905

coming into force (see section 6 of the Act). The first Court held that there was no such custom. The Divisional Judge, after pointing out that plaintiff was the sole proprietor of the whole town with the exception of a small area held by certain *malikan kabza*, held that there was a custom of pre-emption, but that it existed in favour of plaintiff alone and being a custom in favour of one man alone was not the sort of custom contemplated in the Act. I am unable to see that the fact that the custom was one in favour of one man alone alters the fact that there was a custom of pre-emption in existence. But before I can interfere, I think I should see whether the Divisional Judge's finding that a custom existed can be allowed to stand. The Divisional Judge comes to this finding on the strength of one solitary instance, a case in which the present plaintiff sued and got a decree in 1885. Plaintiff's counsel also says there were two other cases in 1865. But he owns that there must have been many sales in Umar both before and since 1885. So we have the remarkable fact that for twenty years prior to the passing of Punjab Act II of 1905 there is not a single case of pre-emption; we have to go back to 1885 to find a case, and back to 1865 to find a further case. I should hesitate to say on the authority of so few instances that any custom was proved; I certainly cannot hold that any custom was existent in 1905.

The application fails and is dismissed. No order as to costs.

Revision rejected.

No. 29.

Before Hon. Mr. Justice Chevis.

TARI BAZ KHAN AND 15 OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

FATEH KHAN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1070 of 1910.

Custom—alienation—succession—status of collaterals in sixth and seventh degree in presence of daughters to challenge alienations—Pathans—Mianwali tahsil, Riwaj-i-am.

Held, that it had not been proved that, by custom among Pathans of the Mianwali tahsil, collaterals in the sixth and seventh degree have a right to sue for possession of alienated land in presence of daughters of the alienor.

5 P. R. 1908 (*Abdul Karim v. Sahib Jan*) (1), and 86 P. R. 1908 (*Bholi v. Man Singh*) (2), referred to.

Held also, that the method of computing relationships among these Pathans is to count from the collaterals to the common ancestor, both being included.

48 P. R. 1908 (*Girdhari Ram v. Faizullah Khan*) (3), followed.

Further appeal from the order of E. A. Estcourt, Esquire, Divisional Judge, Campbellpur, dated the 4th October 1910.

Fazl Elahi, for appellants.

Sohan Lal, for respondent.

The judgment of the learned Judge was as follows:—

19th Decr. 1911.

CHEVIS, J.—The land in suit, 115 *kanals*, 2 *marlas*, belonged to Thaj Khan, and after his death was sold by his widow Mussammat Lalo to the defendant for the small sum of Rs. 9. The plaintiffs, collaterals, sue for possession, challenging the alienation as without necessity. The defendant pleaded—(1) that the plaintiffs had no right to sue in the presence of Thaj Khan's daughters, (2) that the alienation was for consideration and necessity, and (3) that the plaintiffs were estopped by acquiescence.

The first Court found in plaintiffs' favour on all three of the above points and decreed the claim, but the Divisional Judge came to a different finding on all three points and dismissed the suit. The plaintiffs have lodged a further appeal to this Court.

The appeal can be decided solely on the question of plaintiffs' right to claim possession in the presence of daughters.

The three daughters of Thaj Khan are still alive. Two of them married collaterals, and so their sons are included among the plaintiffs. But if the daughters succeed in preference to the collaterals the sons of those daughters cannot sue in the presence of their mothers; if the daughters of Thaj Khan are the real persons entitled to possession they and they alone can have a right to oust the defendant. Had the daughters assigned their rights the case would have been different, but no such assignment has been pleaded.

So the question is whether on the death of Thaj Khan's widow the right to hold his land passed to the daughters or to the collaterals. The plaintiffs would be regarded as collaterals in the fifth degree if the usual method of computation were followed, *i. e.*, to count upwards from the last male owner

(1) 5 P. R. 1908.

(2) 86 P. R. 1908.

(3) 48 P. R. 1908.

to the common ancestor, both being included, but the parties are Pathans who belong to the Mianwali *tahsil*, formerly part of the Bannu District, and here the mode of computation is to count from the collaterals to the common ancestor both being included—see 48 *P. R.* 1908 (*Girdhari Ram v. Faizullah Khan*) (1). Adopting this method of computation, the plaintiffs are collaterals some in the sixth and the rest in the seventh degree. The *Riwaj-i-am* lays down that daughters succeed in the absence of collaterals within the sixth degree (*chhe pusht ke andar*). This in my opinion means that daughters are excluded by collaterals in the fifth degree, but not by collaterals in the sixth degree. I form this opinion after referring to the four instances quoted in the *Riwaj-i-am*, which are as follows :—

- (1) Bakhtawar died. There were collaterals in the fifth degree but the daughter succeeded.
- (2) Ahmad Khan died, no collaterals for five degrees, and the married daughter succeeded.
- (3) Muhammad Khan died, no collaterals up to the fifth degree, and the daughter succeeded.
- (4) Prem died, no collaterals up to the fifth degree, and the daughter succeeded, the *warisan* suing in vain.

Had the meaning of the phrase *chhe pusht ke andar* been that collaterals up to and including those in the sixth degree excluded daughters, I should have expected to find it recorded in the above four instances, that there were no collaterals up to the sixth degree, whereas in each case the degree spoken of is the fifth.

In 5 *P. R.* 1908 (*Abdul Karim v. Sahib Jan*) (2) it is laid down that there is no general rule that, regardless of tribe and creed, agnates, however remote, exclude daughters from succession to ancestral property. In 86 *P. R.* 1908 (*Bholi v. Man Singh*) (3) it is also laid down that the burden of proving a custom whereby remote collaterals, such as those of the sixth degree, exclude daughters rests on the party who asserts such a custom, so the *onus* of proof was rightly laid on the plaintiffs in this case. No instances of a collateral in the sixth degree excluding a daughter has been cited and the mere assertions of witnesses, as to what the custom is, cannot be regarded as of any value in the absence of instances. All that

(1) 48 *P. R.* 1908.(2) 5 *P. R.* 1908.(3) 86 *P. R.* 1908.

can be said is that the collaterals have obtained mutation of names in their favour as regards the rest of Thaj Khan's land, but this fact alone is not worth very much when we remember that two of the daughters of Thaj Khan, who might have claimed mutation in their own favour, are represented by sons who figure among the collaterals. No doubt the amount of land falling to those sons is lessened by the inclusion of other collaterals but still I do not think this fact alone sufficient to discharge the burden of proof, especially in face of the entry in the *Riwaj-i-am*. That entry is against the collaterals, and cannot be altogether disregarded, even though the first instance might be criticized as one open to doubt as an instance where the daughter, contrary to the rule laid down, excluded even collaterals in the fifth degree. The use of the word *warisan* too in the fourth instance might be commented on, as showing a want of precision, for the *waris* is surely the person entitled to succeed, whoever he or she may be; but probably the word is merely a careless slip for *jaddian*. In fact in all the instances the wording seems to me inaccurate, the words "*aulad narina*" being used, e. g., *panch pusht tak us ki aulad narina koi na thi*. When the proper word should be *jaddian*. Still, however these instances may be criticized, there is the fact that the rule is laid down in the *Riwaj-i-am* and three instances are given of a daughter succeeding in the absence of collaterals in the fifth degree, while one instance is cited of a daughter succeeding even in the presence of collaterals in the fifth degree. It may be said that there is nothing in the second and third instances to show that there were any collaterals even beyond the fifth degree. It may also be urged that daughters sometimes succeed by consent, even though not strictly entitled to do so, especially where they have married collaterals or where the amount of land is small. But though such arguments may lessen the value of the entry in the *Riwaj-i-am* and of the instances there quoted, I do not think that this entry and the instances can be entirely disregarded.

The case stands thus. The burden of proof is on the plaintiff, there is in their favour nothing but the fact that they have succeeded to the rest of Thaj Khan's land, while there is against them the entry in the *Riwaj-i-am* supported by four instances. I consider that plaintiffs have failed to discharge the *onus* and I must therefore uphold the decision of the learned Divisional Judge on the ground that plaintiffs have failed to prove a right to sue for possession in the presence of Thaj Khan's daughters.

I say nothing as to the alienation being for necessity. Any thing I might write on this point would be merely *obiter dictum* after I have come to the above finding, and certainly would not be binding on the daughters of Thaj Khan, who may very possibly sue on their own account now that the collaterals have failed to wrest the land from the defendant.

I note that in 48 P. R. 1908 (*Girdhari Ram v. Faizullah Khan*) (1), the question of the daughters succeeding as heirs was raised, but the right of the daughters to succeed to the exclusion of the plaintiffs (collaterals in the sixth degree) was not decided, it being held that the plaintiffs' suit which was merely for a declaration, was maintainable even in the presence of the daughters and of nearer collaterals.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 30.

Before Hon. Mr. Justice Johnstone.

TULSI AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

MADHO RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 403 of 1910.

Punjab Limitation (Ancestral Land Alienation) Act, I of 1900—limitation for suit by reversioners to recover land sold by their collateral who died more than twelve years before suit, mutation taking place within twelve years—starting point of limitation—Indian Limitation Act, Article 144.

Plaintiffs sued on 20th February 1909 for possession of land, which their father's brother had alienated by deed, dated 23rd July 1887, on the ground that the sale was without consideration and necessity. The alienor died more than twelve years before suit, but mutation was not effected till 23rd February 1897.

Held, that where the last male owner alienated and died before Punjab Act I of 1900 came into force, the reversioner must sue within twelve years of alienor's death regardless of when mutation was effected upon the alienation and that consequently the present suit was barred by time.

18 P. R. 1895 (F. B.) (*Roda v. Harnam*) (2), 90 P. R. 1904 (F. B.) (*Sahib Dad v. Rahmat*) (3), 145 P. R. 1907 (*Miran Baksh v. Ahmad*) (4), and 11 P. R. 1909 (*Karm Singh v. Muhammad Din*) (5), referred to.

Further appeal from the order of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated 10th August 1909.

Govind Das, for appellants.

Dwarka Das, for respondents.

(1) 48 P. R. 1909.

(2) 18 P. R. 1895 (F. B.).

(3) 90 P. R. 1904 (F. B.).

(4) 145 P. R. 1907.

(5) 11 P. R. 1909.

The judgment of the learned Judge was as follows:—

26th Decr. 1911.

JOHNSTONE, J.—The sole question for decision in this appeal is, whether the suit instituted on 20th February 1909 is within time or not. Ruldu, the last male owner died fifteen or sixteen years before suit, and if the old Law applies, the suit is barred under Article 144, Act XV of 1877, *cf.* 18 *P. R.* 1895 (*F. B.*) (*Roda v. Harnam*) (1). But the alienation having taken place in 1887, mutation was not effected until 23rd February 1897, or less than twelve years before suit, and thus, if Punjab Act I of 1900 rules the case, the suit is not out of time. Both the Lower Courts have held, following 90 *P. R.* 1904 (*F. B.*) (*Sahib Dad v. Rahmat*) (2), that the Punjab Act has no application and have dismissed the suit and appeal respectively.

Plaintiffs come up here on revision and their petition has been admitted as a further appeal. They argue that the Full Bench ruling is distinguishable. No doubt the facts are not quite as here, but in my opinion the principle laid down is fully applicable in the present case. There, mutation was more than twelve years before suit, but the alienor died less than twelve years before suit, and it was held that the new Act (Punjab Act I of 1900) did not, in view of section 4, Punjab General Clauses Act, 1898, deprive plaintiff of his right to sue under Article 144, Act XV of 1877, any time within twelve years of death of alienor. Here mutation took place less than twelve years before suit while the alienor died more than twelve years before suit, and the question is whether the new Act can be brought in to save limitation because, when it came into force, plaintiffs still had a subsisting right to sue under the old law. I have carefully read 90 *P. R.* 1904 (*F. B.*) (*Sahib Dad v. Rahmat*) (2), and also Civil Appeal 664 of 1909 (by Shah Din, J. and myself) and Civil Appeal 702 of 1905 (by Lal Chand, J.) and 11 *P. R.* 1909 (*Karn Singh v. Muhammad Din*) (3) by Reid, C. J., and 145 *P. R.* 1907 (*Miran Bakhsh v. Ahmad*) (4) (Division Bench) and in my opinion all these rulings point really the same way. If the last male owner alienated and died before Act I of 1900 aforesaid came into force, the reversioner must sue within twelve years of alienor's death regardless of when mutation was effected upon the alienation.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

(1) 18 *P. R.* 1895 (*F. B.*).
(2) 90 *P. R.* 1904 (*F. B.*).

(3) 11 *P. R.* 1909.
(4) 145 *P. R.* 1907.

No. 31.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

BHERO DAS AND OTHERS—(PLAINTIFFS)—
PETITIONERS

Versus

MONA—(DEFENDANT)—RESPONDENT.

Civil Revision No. 1426 of 1905.

Punjab Alienation of Land Act, XIII of 1900, section 9—reference to Deputy Commissioner in case of a mortgage by conditional sale, after year of grace has expired—Jurisdiction of Civil Court.

The defendant, a member of an agricultural tribe, mortgaged his land to plaintiff by way of conditional sale on 20th March 1896. In October 1900 plaintiff had a notice issued under Regulation XVII of 1806.

The Punjab Alienation of Land Act came into force on the 8th June 1901, the plaintiff applied in 1901, under section 6 of the Act, to the Deputy Commissioner to be granted a mortgage of the land in lieu of his mortgage by way of conditional sale. The Deputy Commissioner ordered the defendant to execute a mortgage for 20 years, and on the latter failing to do so, decided on 9th September 1901 to take no further action and to relegate the parties to their former rights.

On 24th October 1901, the plaintiff instituted the present suit for possession of the land mortgaged to him. The lower Appellate Court held that the Civil Court had no jurisdiction and that the case must be referred to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act.

Held, that as the proprietary title of the plaintiff (the former mortgagee) had become complete on expiry of the year of grace, the present suit must be regarded, not as based on the original mortgage but as founded on plaintiffs' proprietary title—and moreover as sub-section (2) of section 9 of the Punjab Alienation of Land Act did not apply to a case where the mortgage was no longer "current" when the suit was instituted—no reference to the Deputy Commissioner under sub-section (3) of the section was called for.

Held also, that the Deputy Commissioner had a discretionary power under section 9 (2), either of putting the mortgagee to his election (as therein provided) or of sanctioning the retention of the conditional sale clause and that the Deputy Commissioner's order of 9th September 1901 must be construed to amount to such a sanction and that for this reason also, no reference to the Deputy Commissioner under sub-section (3) was called for and the Civil Court had jurisdiction to decide the case.

103 P. R. 1901 (F. B.) (*Atar Singh v. Ralla Ram*) (1), referred to.

Petition under section 70 (a) of Act XXV of 1899 for revision of the order of Captain B. O. Roe, Divisional Judge, Ferozepore Division, dated the 9th May 1905.

Lakshmi Narain and Sangam Lal, for petitioner.

Respondent in person.

The judgment of the Court was delivered by—

21st Decr. 1905.

RATTIGAN, J.—On the 20th March 1896 defendant executed in favour of plaintiff a mortgage of certain agricultural land. The mortgage which was by way of conditional sale, was for a period of 3 years and under its terms the mortgagor was to retain possession.

In October 1900 the mortgagee had a notice under section 8 of Regulation XVII of 1806 issued to defendant, and the “year of grace” consequently expired in October of the following year.

The Punjab Alienation of Land Act (XIII of 1900) had come into force prior to the date when, under the ruling of the Full Bench in No. 103 P. R. 1901 (*Atar Singh v. Ralla Ram*) (1), the title of the mortgagee (or, rather conditional vendee) to the land become complete, *i.e.*, upon the expiry of the year of grace.

In 1904 the plaintiff (the *quondam* mortgagee) applied, under section 6 of the Act above referred to, to the Deputy Commissioner, praying that, in lieu of the mortgage by way of conditional sale, he might be granted a mortgage of the land in one or other of the forms permitted by that section. As the plaintiff's title to the land had long prior to this time become absolute, this action on his part was, it would seem, quite unnecessary. However, this point was overlooked not only by the plaintiff but also by the Deputy Commissioner, and the latter officer, after making such enquiries as he deemed necessary, directed the mortgagor to execute in favour of plaintiff a mortgage of the land for 20 years in the form permitted by section 6 (1) (a) of the Act. This order was not complied with and consequently on the 9th September 1904 the Deputy Commissioner, taking the mortgagor's non-compliance with his former order to be *tantamount* to a refusal to execute the fresh mortgage deed, decided to take no further action himself in the matter and to relegate the parties to their former rights. In so acting the Deputy Commissioner was obviously guided by the instructions to Revenue Officers contained in the Financial Commissioner's Circular No. 3482, dated 6th June 1903.

Plaintiff has now sued for possession of the land in question and his suit is ostensibly based on the ground that the foreclosure proceedings have been completed and that he is consequently entitled to a decree. His suit was decreed by

the First Court and the defendant's pleas, as to the jurisdiction of the Civil Courts to entertain the suit, the validity of the original mortgage deed and the regularity of the foreclosure proceedings, were all decided in favour of plaintiff. Upon appeal, however, the learned Divisional Judge held that under clause (3) of section 9 of the Punjab Alienation of Land Act, the case must once again be referred to the Deputy Commissioner.

The plaintiff applied to this Court for revision of this order and the application has been admitted under section 70 (1) (a) of the Punjab Courts Act and sent to a Division Bench for determination. Unfortunately the respondent was not represented by counsel and we have, therefore, heard arguments only on behalf of the plaintiffs, the defendant when called upon to reply merely stating that he was now willing to execute the mortgage deed which he was directed by the Deputy Commissioner to execute. The point before us for decision is one of difficulty, and before coming to a decision we should have preferred to hear arguments on both sides. The difficulty is in the present case of a two-fold character. In the first place, it is clear, upon the Full Bench ruling, that the title of plaintiff to the property became absolute and that his former rights as mortgagee ripened into rights of ownership, as soon as "the year of grace," under the Regulation of 1806, expired. This was in October 1901. But meantime the Punjab Alienation of Land Act, 1900, had come into force, and as the mortgagee (plaintiff) was out of possession, it is clear that before he could get possession, he had to institute a suit for possession. He then comes into Court and asks for a decree for such possession, and the first question is whether in such a case it can be said that his "suit" is one on a mortgage to which sub-section (1) or sub-section (2) of the 9th section of Act XIII of 1900 applies, and if, even if it is so, the Civil Court is bound to refer the case to the Deputy Commissioner, seeing that (under the ruling of the Full Bench) the mortgage is no longer "current" and the Deputy Commissioner has under sub-section (2) authority to interfere with mortgages by way of conditional sale only during "the currency" of those mortgages. Relying upon the authority of the Full Bench ruling we answer these questions in the negative. When the year of grace has expired, the proprietary title of the former mortgagee becomes *ipso facto* complete and any decree that he may subsequently obtain from the Court "in no way creates" his title as owner; this title has already been created and completed by the proceedings under the Regulation, and the subsequent suit of the former mortgagee

(now owner) must be regarded, not as based on his original mortgage, but as founded on his proprietary right. He is, in a word, suing in such cases as an owner and the suit is against a person who is to be regarded either as a trespasser or as a tenant, in our view the former. The mortgage *qua* mortgage is at an end and the erstwhile mortgagee is now proprietor. When, therefore, he sues for possession, his suit is not "on" the mortgage, but "on" proprietary title, and consequently section 9 (3) of the Punjab Alienation of Land Act would not apply. Further, it would not apply because it is clearly only in those cases in which a Deputy Commissioner is "empowered" to act under section 9 (2) that references should be made under section 9 (3) and if (as in this case) the mortgage is no longer "current" when the suit is instituted, it cannot have been intended that the Civil Court should make a perfectly futile reference under section 9 (3). The only result of such reference would be that the Deputy Commissioner, finding that the mortgage as such no longer existed, would decline (and quite properly) to take an action which was without his jurisdiction.

The second difficulty is of a different kind. Under section 9 (2) of the Act a Deputy Commissioner is "empowered," in the cases specified, to put a mortgagee to his election "whether he will agree to the said condition being struck out or to accept in lieu of the said mortgage" a mortgage in the form permitted by section 6 of the Act. But the Deputy Commissioner though "empowered" to interfere under the second sub-section of section 9, is clearly not *obliged* to do so, and it is, we think, competent for him, if he deems it fit and proper, to decline to take action under the sub-section and to relegate the parties to their original position under the mortgage-deed. It seems to us that the procedure here is very analogous to the procedure prescribed in section 3 (2) of the Act, and that just as the Deputy Commissioner can, if he so thinks fit, give sanction to an alienation that would otherwise be unenforceable, so he can either expressly or by implication, sanction the retention in a mortgage (to which, of course, section 10 of the Act does not apply) of a conditional sale clause. If he does give this sanction, the mortgagor and mortgagee are then left in the position which they originally occupied and the mortgagee can thereafter take action upon that clause. This is what has occurred in the present case and in view of the Deputy Commissioner's final order, dated 9th September 1904, which may reasonably be construed as impliedly giving sanction to the retention in the mortgage-deed of the conditional sale clause, it was no longer incumbent

on the Divisional Judge to "refer the case" once again to the Deputy Commissioner under section 9 (3). Such reference would clearly only result in the Deputy Commissioner repeating his former order and the case coming back once more to the Civil Courts. If the Divisional Judge's views are correct, there would obviously be no finality in such cases and the parties would be most unnecessarily put to great expense and harassed by endless delays.

But even here we must admit that there are difficulties, though fortunately they do not appear to arise in the present case. Under section 19 of the Act it may be that the order of the Deputy Commissioner refusing to interfere under section 9 (2) of the Act, is open to appeal, review and revision. The time limited for appeals is, under section 14 of Act XVII of 1887, strictly limited, so also, except for sufficient cause being shewn, is the time within which a review can be entertained (section 15 (1) (b) of Act XVII of 1887); but under section 16 (1) of that Act the Financial Commissioner can "at any time" revise the Deputy Commissioner's order. Possibly these provisions are applicable (though upon this point we can, of course, give no opinion) to orders passed by the Deputy Commissioner under section 9 (2) of Act XIII of 1900, and if so, it may happen that the mortgagee, after receiving the sanction of the Deputy Commissioner to the retention of the conditional sale clause and after taking proceedings in the Civil Courts to enforce his rights thereunder, may find that in the end his time, trouble and expense have been wasted. We do not, as at present advised, think that this could be the case, once the "year of grace" had expired and the mortgagee's title had become converted into a proprietary title; further the action of the Revenue authorities under section 9 (2) would probably not be *intra vires*. But so long as the mortgage remains "current" there would appear to be no obstacle to that action being taken at any time, even though the mortgagee had meanwhile instituted legal proceedings to enforce his rights. Another point of importance and no less difficulty may arise (though fortunately it has not in this case) in connection with section 9 (2) of Act XIII of 1900—Supposing that the mortgagor takes exception to the *validity* of the mortgage when the question comes before the Deputy Commissioner under that sub-section, what action is the Deputy Commissioner to take? Apparently he has no power to inquire into this plea, and it is quite possible that in some cases he may find himself in a dilemma. The case may be one in which, apart from this plea, he may

consider it eminently right and proper that the mortgage should be converted into one in the form permitted by clause (a) or clause (b) of section 6 of the Act and yet as he cannot assume that the mortgage is a valid one, it would be repugnant to all sense of justice to compulsorily foist on the mortgagor a mortgage which would necessarily be binding upon him in lieu of a mortgage which *may* be invalid against and not binding upon the latter. If in any such case he declines to take action it *may* be that the Civil Courts will find the mortgage valid and enforce the conditional sale clause (as they would be bound to do under these circumstances) against the mortgagor. This question, we are happy to say, does not arise in the present case, as the Deputy Commissioner has expressly remitted the parties to their original rights under the mortgage-deed and clearly does not think that the enforcement of the conditional sale-clause is in the present instance objectionable. The point, however, is one which might with advantage be brought to the notice of the Legislature, if at any time the amendment of Act XIII of 1900 is under consideration.

For these reasons, already given, we hold that in the case before us there was no necessity for a reference under section 9 (3) of Act XIII of 1900 and we accordingly accept this application and remand the case under section 562, Civil Procedure Code, to the Divisional Judge for decision on the merits, costs to be costs in the cause.

Case remanded.

No. 32.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

CHHANGU—APPELLANT

Versus

MUHAMMAD BAKHSI—RESPONDENT.

Civil Reference No. 50 of 1910.

Jurisdiction—Civil or Revenue Court—suit by landlord to dispossess a mortgagee of an occupancy holding on the death of the occupancy tenant—Punjab Tenancy Act, XVI of 1887, section 77 (3) (h).

Held, that a suit by a landlord to dispossess a mortgagee of an occupancy holding, which had ceased to exist owing to the death of the occupancy tenant, fall within the terms of section 77 (3) (h) of the Punjab Tenancy Act, and is consequently cognisable by a Revenue Court.

9 P. R. 1910 (*Qadu v. Buland Khan*) (1), overruled.

88 P. R. 1894 (*Gurdial v. Farida*) (2), referred to.

Case referred by the Deputy Commissioner of Gurdaspur, with his letter No. 1060, dated 5th July 1910.

Nemo, for appellant.

Nemo, for respondent.

This case was referred to the Chief Court under section 100 of the Punjab Tenancy Act by C. M. King, Esquire, Collector, Gurdaspur District, with the following order, dated 1st July 1910 :—

In this case I feel bound to refer the case to the Chief Court because of the ruling quoted as 9 P. R. 1910 (*Qadu v. Buland Khan*) though I respectfully record my disagreement with that ruling. Section 77 (3) (h) of the Tenancy Act distinctly says that a "suit.....to dispossess a person to whom" a "transfer" of a right of occupancy has been made, is triable by a Revenue Court. This is a suit to dispossess Chhangu to whom a right of occupancy was transferred by Khazana. Therefore, it seems to me, that it has rightly been tried by a Revenue Court. I am unable to distinguish the case, however, from No. 9 P. R. 1910. There it has been held that the case is triable by a Civil Court and bowing to that ruling, I submit the file to the Chief Court under section 100 of the Tenancy Act. The parties have been informed that it is not necessary for them to appear before the Chief Court, but that if they wish to appear they can do so by entering an appearance within three weeks of this date.

The order of the learned Chief Judge referring the case to a Division Bench was as follows :—

SIR ARTHUR REID, C. J.—This case has been referred to this Court by the Collector of Gurdaspur, in view of the decision in 9 P. R. 1910 (*Qadu v. Buland Khan*) (1), for an order under section 100 of the Tenancy Act, although his own opinion was opposed to the ruling. In 9 P. R. 1910 (*Qadu v. Buland Khan*) (1) it was held that a suit by a landlord, after the death of an occupancy tenant, against that tenant's mortgagee with possession, for possession of the occupancy holding, on the ground that the occupancy right expired under section 59 (4) of the Tenancy Act with the mortgagor, was cognisable by a Civil Court. Section 77 (3) (h) of the Act includes among suits cognizable exclusively by Revenue Courts a suit by a landlord to dispossess a person to whom a transfer of a right of occupancy has been made. The application of the sub-section is not expressly confined to cases in which the transfer is bad *ab initio*, and the language used

14th Nov. 1910.

would apparently apply equally to cases in which the right to dispossess accrued on the happening of an event subsequent to the transfer.

The parties, though warned of the date fixed in this Court, have not appeared, and I see no reason for postponement to enable them to appear. I refer the reference to a Division Bench and order that it be laid before the First Bench to-morrow.

The judgment of the Division Bench was delivered by—

17th Nov. 1910.

KENSINGTON, J.—This is a reference by the Collector of Gurdaspur under section 100 of the Tenancy Act, the Collector holding that under the ruling in 9 P. R. 1910 (*Qadu v. Buland Khan*) (1), a case which was before him on appeal, having been tried by an Assistant Collector of the 1st grade, should have been tried by a Civil Court.

In making the reference the Collector suggested that the correctness of the ruling quoted was not free from doubt, but as the facts of the case before him agreed precisely with the facts in that case, he felt bound to make the reference.

The learned Chief Judge has directed the reference to be laid before a Division Bench for disposal, after considering the question whether the ruling referred to should be upheld. The suit is by the landlords of an occupancy holding to dispossess a transferee from the occupancy tenant after the occupancy tenant's death.

We observe in the first place that the learned Judge, who decided the case *Qadu v. Buland Khan* and others, distinguished the facts therein, from those recited in 88 P. R. 1894 (*Gurdial v. Farida*) (2). We think that the distinction drawn was not really material and that for all practical purposes the facts of those two cases were similar.

But even, if the learned Judge should have been correct in making the distinction drawn by him, we are unable to uphold his conclusion that the case before him had been rightly heard by a Civil Court, no reason was given for this conclusion and it appears to us clearly erroneous. The terms of clause (h) under section 77 (3) of the Tenancy Act are in themselves quite explicit and in our opinion distinctly cover the facts of both the two previous cases of that now before us. The application of clause (h) is, to quote from the learned Chief Judge's order, not expressly confined to cases in which the transfer

is bad *ab initio* and the language used is wide enough to equally cover cases in which the right to dispossess has accrued on the happening of an event subsequent to the transfer. We do not discuss the matter further, as we do not understand upon what grounds the learned Judge took a different view in *Qadu v. Buland Khan* and others (1), and no grounds justifying his view have been recorded by him. We have no hesitation in holding that the decision in *Qadu v. Buland Khan* and others (1) is unsound and must be overruled. Our reply to the present reference is therefore that the case before us has been rightly heard by a Revenue Court, and the records will be returned to the Collector with instructions that he should proceed to deal with the appeal in ordinary course.

Reference accepted.

No. 33.

Before Hon. Mr. Justice Johnstone.

RAM JAWAYA SHAH—(PLAINTIFF)—APPELLANT

Versus

NATHA AND HASNA—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 1247 of 1910.

Muhammadan Law—alienation of minor's immovable property by de facto guardian—suit by alienee against minor in possession—equitable restoration of benefit obtained by minor.

Where the immovable property of a Muhammadan minor has been alienated by a *de facto* guardian, who is not a *near* guardian under Muhammadan Law, and the alienee sues the minor (after attaining majority), he being in possession of the property—

Held, that not only the claim for possession, but also the alternative prayer for equitable restoration of benefit received by the minor from the alienation, must fail, as this can only be enforced against a minor or *quondam* minor, if he is himself plaintiff in the case.

144 P. R. 1883 (*Anant Ram v. Nazir Hussain*) (2), 58 P. R. 1891 (*Dharm Singh v. Sayad Zahur-ul-Hussain*) (3), 52 P. R. 1904 (*Allah Dad v. Budha*) (4) and 91 P. R. 1907 (*Nur Muhammad v. Aimna*) (5), referred to.

Further appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 7th July 1910.

Nand Lal, for appellant.

Govind Das, for respondents.

(1) 9 P. R. 1910.

(2) 144 P. R. 1883.

(3) 58 P. R. 1891.

(4) 52 P. R. 1904.

(5) 91 P. R. 1907,

The judgment of the learned Judge was as follows :—

15th May 1911.

JOHNSTONE, J.—This is a case of the alienation of a Muhammadan minor's immovable property by a *de facto* guardian, who was not a *near* guardian under Muhammadan Law. The minor, now of age, is in possession, and the plaintiff is the alienee. The Courts below have rightly held that the suit for possession must fail; and the petition for revision was admitted under clause (b), section 70 (1), Punjab Courts Act, as regards the question of the liability of defendant to restore the undoubted benefit that he had received from the alienation, which operated to relieve him of a debt due by his father from whom he had inherited property. On examining the authorities—144 P. R. 1883 (*Anant Ram v. Nazir Hussain*) (1), 58 P. R. 1891 (*Dharm Singh v. Sayad Zahur-ul-Husain*) (2), in which the alienee was plaintiff, and 52 P. R. 1904 (*Allah Dad v. Budha*) (3), and 91 P. R. 1907 (*Nur Muhammad v. Aimna*) (4), in which the *quondam* minor was plaintiff, I find that equitable restoration of benefit received can only be enforced against the minor or *quondam* minor if he is himself plaintiff in the case.

For these reasons I dismiss the appeal with costs.

Appeal dismissed.

No. 34.

Before Hon. Mr. Justice Shah Din.

NAJABAT ALI—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT MEHTAB BIBI—(DEFENDANT)—
RESPONDENT.

Miscellaneous Civil Appeal No. 405 of 1911.

Guardian and Wards Act, VIII of 1890, sections 34 (e), 39 (e) and 45—punishment of guardian for disobeying order under section 34 (e)—removal.

Held, that section 45 of the Guardians and Wards Act makes no provisions for imposing a penalty on a guardian for disobedience to the order of the Court under section 34 (e) and, although such a guardian may be removed under section 39 (e), the imposition of a fine is *ultra vires*.

Miscellaneous appeal from the order of Bhai Charat Singh, District Judge, Jhelum District, dated the 6th February 1911.

Appellant in person.

Respondent in person.

(1) 144 P. R. 1883.
(2) 58 P. R. 1891.

(3) 52 P. R. 1904.
(4) 91 P. R. 1907.

The judgment of the learned Judge was as follows:—

SHAH DIN, J.—The District Judge does not say in his order under what section of the Guardians and Wards Act he has fined the appellant. Under section 34 (e) of the said Act the District Judge had power to direct the guardian to apply for the maintenance of the ward such portion of the income of the property of the ward as the Judge from time to time saw fit to direct; and if the guardian refused to carry out the direction of the Court in this behalf, he could be removed under section 39 (e) of the Act. Section 45 of the Act makes a provision for imposing a penalty on the guardian for contumacy, but the omission on his part to obey the direction of the Court under section 34 (e) is not made punishable; and it follows that the order of the Lower Court, if it was passed under section 45 aforesaid (and I fail to see how the order in question could have been passed under any other section), is *ultra vires*. 12th June 1911.

I therefore accept the appeal and set aside the order imposing a fine of Rs. 50 on the appellant.

I think the proper procedure for the District Judge to adopt would be to take action under section 39 of the Act, and if he finds that the guardian has been guilty of contumacious disregard of any provision of the Act or of any order of the Court, he can remove him and appoint another guardian instead. Parties will bear their own costs in this Court.

Appeal accepted.

No. 35.

Before Hon. Mr. Justice Rattigan.

GOBIND RAM—(PLAINTIFF)—PETITIONER

Versus

MUHAMMAD ALI AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 2553 of 1910.

Civil Procedure Code, Act V of 1908, order IX, rule 2—penal clause must be strictly construed—guardian ad litem not a defendant—suit not to be dismissed, if plaintiff shows sufficient cause—proper course where there are minor defendants.

A suit was instituted in which some of defendants were put down as minors under the guardianship of their father. A summons was sent to the latter, but he refused to act as guardian—a summons was then issued to the minor's mother, who also refused to act. Therefore the Court appointed the Civil Nazir of his Court guardian *ad litem* and directed summons to

issue to him. When at the hearing of the case it was found that no summons had been sent to the Nazir, as no process fee had been paid, the Court dismissed the suit under order IX, rule 2, Civil Procedure Code 1908, and subsequently refused an application praying that the order of dismissal be set aside on the ground that the process fee for a summons to the Civil Nazir was not paid, as it was not thought necessary to issue summons on an officer of the Court itself.

Held, that the cause assigned by plaintiff was good and sufficient.

Held also, that the penal provisions of order IX, rule 2 must be construed strictly and they do not apply to the case of a guardian *ad litem* who is not a "defendant" in the suit.

Held further, that in cases like the present the proper course is to issue summons to the minors themselves and after that for the Court to decide whether it is necessary to appoint a guardian *ad litem* and if so, who should be appointed, the minors having a right to be heard on that point.

Suresh Chunder Wum v. Jugut Chunder Deb (1), referred to.

Petition under section 70 (a) of Act XVIII of 1884, for revision of the order of Munshi Muhammad Ali, Sub-Judge, Hoshiarpur, dated the 2nd May 1910.

Devi Dial, for petitioner.

Gokal Chand, for respondents.

The judgment of the learned Judge was as follows:—

17th July 1911.

RATTIGAN, J.—Plaintiff sued for possession of certain land as mortgagee thereof and among the persons impleaded as defendants were certain minors who were described as such in the plaint, their guardian *ad litem* being given as their father, Babu. A summons in the ordinary course was issued to Babu, but on his refusal to act as guardian, a summons was issued to the minor's mother she also declined to act, and accordingly on the 19th April 1910 the Sub-Judge (obviously acting under order 32, rule 4, clause (4), Civil Procedure Code) appointed the Civil Nazir of his Court guardian *ad litem* of the minors, directed summons to issue to him, and fixed the 2nd May 1910 for the next hearing. At the time when this order was passed the plaintiff was not present in person, but his pleader was present. On the 2nd May 1910 it was discovered that no summons had been issued to the Civil Nazir owing to the fact that process fee had not been paid. The plaintiff who was present in person on the 2nd May explained that the default in paying such process fee was due to the fact that his pleader was under the impression that as the person who had been appointed guardian *ad litem* was an officer of the Court, no process fee for summoning him was

necessary, and that as a result the pleader had not applied to him to pay in such fee. The Sub-Judge held that this was no excuse and dismissed the suit under order 9, rule 2 of the Code. Plaintiff thereafter applied under order 9, rule 4, praying the Sub-Judge to set the dismissal aside, but his prayer was rejected in a somewhat rambling order of the Sub-Judge, on the ground that the plaintiff was bound by the negligence of his pleader. I am now asked to set this order aside and I have no hesitation in doing so.

In my opinion, the cause assigned by the plaintiff which is true in every particular was good and sufficient and the Sub-Judge in arbitrarily rejecting it, failed to exercise a judicial discretion. It seems to me that plaintiff's pleader had every reason to suppose that the Court when appointing its own officer to act as guardian *ad litem*, would see that due notice was given to that officer of his appointment and that there was in fact no negligence on the part either of the pleader or of plaintiff. Furthermore a guardian *ad litem* is not a defendant in a suit; he merely represents the defendant minor; and therefore the penal provisions of order 9, rule 2, which must by the ordinary rules of construction be interpreted strictly, cannot be extended to cover a case which is not within the letter of the rule. In point of fact a summons should, in my opinion, be served in the first instance upon the minor personally, at all events in those cases where he has no certificated guardian; and I share the doubts of Wilson, J., in *Suresh Chunder Wum v. Jugut Chunder Deb* (1), as to whether service on a guardian *ad litem* is sufficient service for the purposes of the Code. But be this as it may, it is clear that order 9, rule 2, can have no application to the case of a failure to serve notice upon a guardian *ad litem*, as the latter is not a "defendant" in the literal sense.

In the present case the Sub-Judge acted with unjustifiable harshness in dismissing the suit. Plaintiff had done everything in his power to get summonses duly served upon the individuals whom he believed to be the proper persons to act as guardians *ad litem* of the minors and in the circumstances the Sub-Judge would have acted wisely had he accepted plaintiff's excuse for failing to pay in process fee for the summons to the Nazir. Had he directed summonses to issue to the minor defendants, plaintiff might well have had no reason to complain if the suit had been dismissed owing to his failure to pay

process fees for the issue of such summons. But that is not the case here, and I fail to see how the penal provisions of order 9, rule 2, can be held to justify the action of the Sub-Judge.

I accept the petition, set aside the orders of the Sub-Judge, dated 2nd May and 25th May 1910, and return the record with a direction that the suit be proceeded with in accordance with law. Plaintiff should be called upon to pay process fee for summonses to the defendants and summonses should issue to the latter personally, whether they happen to be majors or minors. After service of such summonses the Court will have to decide whether it is necessary to appoint a guardian *ad litem* and, if so, whom it should appoint. This is a question upon which the infant has a right to be heard and no order appointing a guardian *ad litem* should be made until the Court is satisfied that the infant has been duly served and has had an opportunity of having had an application in that behalf made on his account. (*Suresh Chunder Wum v. Jugut Chunder Deb*) (1).

Costs of this petition will abide the event.

Case remanded.

No. 36.

Before Hon. Mr. Justice Chevis.

AMAR SINGH AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

HUSAINA AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 92 of 1911.

Pre-emption—on sale of occupancy holding (under section 6, Punjab Tenancy Act)—suit by joint tenant—rights of landlord—Punjab Pre-emption Act, II of 1905, sections 2 (2) and 12—Punjab Tenancy Act, XVI of 1887, sections 53, 56 and 60.

Held, that the sale to a landlord of occupancy rights under section 6 of the Tenancy Act is liable to pre-emption.

16 P. R. 1905 (*Gauhra v. Har Bhaj*) (2) distinguished.

Further appeal from the order of H. Harcourt, Esquire, I.C.S., Additional Divisional Judge, Amritsar, at Jullundur, dated the 18th August 1910.

Ram Bhaj Datta, for appellants.

Nabi Bakhsh, for respondents.

The judgment of the learned Judge was as follows :—

CHEVIS, J.—This is a pre-emption case in which one of 7th Novr. 1911. two joint occupancy tenants has sold his occupancy rights to the landlord and the other tenant sues to pre-empt. The occupancy rights in question are rights under section 6 of the Tenancy Act. The first Court gave the plaintiff a decree, which the learned Divisional Judge upheld on appeal. The only question is whether such a sale is subject to pre-emption.

For the landlord, appellant, it is urged that a landlord is given the first right of pre-emption even in cases of a sale of occupancy rights held under section 5, and that the landlord's position should be even stronger in a case where the occupancy tenure is held under section 6.

In section 2 (2) of the Pre-emption Act it is laid down that nothing in the Act shall affect the provisions of section 53 of the Tenancy Act; section 53 lays down that a tenant having a right of occupancy under section 5 must, if he wishes to alienate his occupancy rights, give notice to his landlord through the Revenue officer and that the landlord may then within one month buy the rights at a price to be fixed by that officer. This is of course a kind of pre-emption. In 16 P. R. 1905 (*Ganhra v. Har Bhaj*) (1) it is laid down when dealing with the case of a sale by a *mukarraridar* to the landlords that the proprietors "have a statutory right of purchase under "Chapter V of the Tenancy Act," and so it is held that the co-sharer in the tenancy cannot pre-empt from the landlord. But the *mukarraridar* is a person whose *status* is higher than that of an occupancy tenant, so apparently it was considered that in such a case the landlord was entitled to the full benefits of section 53. And the ruling was one under the old law, *i.e.*, the Punjab Laws Act. But we have in the present case nothing to do with section 53 of the Tenancy Act, as the occupancy rights in question are not rights held under section 5. It is sections 56 and 60, if any, which can benefit the landlord in the present case. Section 56 lays down that a right of occupancy under any section other than section 5 shall not be transferred by private contract without the previous consent in writing of the landlord (I omit the other words of the section as there is no question here of attachment or sale in execution of a decree or order of Court, what has occurred has been a transfer by private contract). Section 60 lays down that any transfer in contravention of the foregoing provisions shall

be voidable at the instance of the landlord. But this is not a case of a landlord seeking to avoid the transfer; on the contrary the landlord seeks to maintain the transfer, which is in his favour, and to defend it against a pre-emptor. So I fail to see how sections 56 and 60 can help the landlord in this case. The plaintiff is clearly entitled to pre-empt, according to the provisions of section 12 of the Pre-emption Act, and granting, for the purposes of argument, that section 2 (2) of the Pre-emption Act combined with section 53 of the Tenancy Act, debars any one from the pre-empting from a landlord in the case of a sale by a tenant holding under section 5 of the Tenancy Act in favour of the landlord, still I am quite unable to find anything, either in the Tenancy Act or in the Pre-emption Act, which gives a landlord any right of pre-emption or right to defeat a claim to pre-empt in the case of a sale of a right of occupancy held under any section, other than section 5. What the landlord can do is to withhold his consent to the transfer in the first place, but if the transfer once takes place, then the landlord's position seems to me to be as follows:—If the sale is in favour of a third person and the landlord has not consented, he can sue to avoid the sale under the provisions of section 60. But if the landlord has given his previous consent in writing, or if he is estopped by reason of being himself a party to the sale, then he cannot avail himself of the provisions of section 60, and the sale remains an accomplished fact not liable to attack by the landlord under the provisions of section 60 of the Tenancy Act, but subject to the pre-emptory claim of anybody, who can prove his claim to pre-empt under the provisions of the Pre-emption Act.

I uphold the decision of the Lower Courts, and dismiss this appeal with costs.

Appeal rejected.

No. 37.

*Before Hon. Mr. Justice Shah Din and Hon. Mr.
Justice Chevis.*

TAPESSIER AND COMPANY—(DEFENDANTS)—
APPELLANTS

Versus

NASIR-UD-DIN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Revision No. 1519 of 1909.

Arbitration—agreement to submit—bar to suit—Specific Relief Act, I of 1877 (last clause)—not applicable to submissions falling within section 3, Indian Arbitration Act, IX of 1899—applications for stay of suit under

section 19 of that Act and section 18, Schedule II, Civil Procedure Code 1908 necessary.

Held, that in cases where, if the subject matter submitted to arbitration were the subject of a suit, the suit could have been instituted in a Presidency town, the last 37 words of section 21 of the Specific Relief Act do not apply (*vide* sections 2 and 3 of the Indian Arbitration Act).

And, consequently, as defendant had made no application to stay the suit under section 19 of the Arbitration Act or under section 18, Schedule II of the Civil Procedure Code, the agreement to refer to arbitration was no bar to the present suit.

Petition under section 25 of Act IX of 1887 for revision of the order of Khawaja Tasaddug Hussain, Judge, Small Cause Court, Delhi, dated the 24th February 1909.

Dharam Das Suri, for petitioners.

Balwant Rai, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—The sole question on which the petitioner's 21st Novr. 1911.
pleader has addressed us in this case is whether or not the plaintiffs-respondents' suit was barred by the last clause of section 21 of the Specific Relief Act, 1877. On behalf of the petitioners it is urged that the suit was so barred, on the grounds, (1) that on the date on which the suit was instituted in the Lower Court, *viz.*, the 16th October 1908 the new Civil Procedure Code, which, by section 22 of the second schedule, has repealed the last 37 words of section 21 of the Specific Relief Act so far as they affected an agreement to refer to arbitration to which the provisions of that schedule apply, had not come into force, and (2) that the plaintiffs-respondents had refused to refer the matter to arbitration before instituting their suit. In answer to this argument, the pleader for the plaintiffs-respondents has referred to sections 2 and 3 of the Indian Arbitration Act, IX of 1899, and with reference to those sections has contended (1) that the provisions of the said Act applied in the present case inasmuch as the Head office of the petitioners being in Calcutta, which is a Presidency town, the present suit could have been instituted in that town, and (2) that by virtue of section 3 aforesaid the last 37 words of section 21 of the Specific Relief Act did not apply to the agreement to refer to arbitration which is relied on by the petitioners. We think that this contention is well founded and must prevail. In fact, the learned pleader for the petitioners conceded that the present suit could have been instituted in the Presidency town of Calcutta and that the provisions of Act IX of 1899 were applicable to the present case. It is further con-

ceded that no application under section 19 of the aforesaid Act or under section 18 of the second schedule of the Civil Procedure Code was made to the Lower Court for stay of suit.

We accordingly hold that the suit of the plaintiffs-respondents was not barred by the last clause of section 21 of the Specific Relief Act at the time the suit was instituted and we dismiss this revision with costs.

Revision rejected.

No. 38.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Shah Din.

MEHR SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

DEVI DYAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1094 of 1909.

Custom—Succession—Schgal Khattris of Eminabad, Gujranwala District—Hindu Law—partition of interest in joint Hindu family property—effect of—Riwaj-i-am—Wajib-ul-arz.

Held, that *Schgal Khattris* residing in the town of Eminabad, who own no agricultural land and never carried on agriculture as a means of livelihood, are governed by Hindu Law in the matter of succession to a *haveli* in the town—the *Riwaj-i-am* (1867) of the Gujranwala District and *Wajib-ul-arz* (1856) of *mauza* Eminabad not being applicable to the parties and to the property in question.

Held also, that as there had been a parole agreement between the members of the joint Hindu family to partition the *haveli* in dispute in interest and right, such partition was as effectual in law as a partition by “metes and bounds,” with the result that the character of undivided property and joint ownership was taken away from that property and it became the subject of ownership in certain defined shares.

Approver v. Rama Subba Aiyar (1), *Doorga Pershad v. Mussammatt Koondan Kowar* (2), *Balabux v. Rukhmabai* (3), *Balkishen Das v. Ram Narain Sahu* (4), and *Parbati v. Nannihal Singh* (5), referred to and followed.

First Appeal from the order of Misra Jawala Sahai, District Judge of Gujranwala, dated 19th June 1909.

Lal Chand, for appellants.

Dwarka Das and Zia-ud-din, for respondents.

(1) (1866) 11 *Moo. I. A.* 75.

(2) (1873) 13 *B. L. R.* 235,

(3) (1903) 1 *L. R.* 30 *Cal.* 725 (*P. C.*).

(4) (1903) 1 *L. R.* 30 *Cal.* 738 (*P. C.*).

(5) (1909) 1 *L. R.* 31 *All.* 412 (*P. C.*).

The judgment of the Court was delivered by—

SHAH DIN, J.—This is an appeal from the decree of 25th Novr. 1911. the District Judge of Gujranwala dismissing the suit brought by the plaintiffs-appellants for possession of two-third share of a *haveli* known as *haveli* Malwian situated in the town of Eminabad, *tahsil* and district Gujranwala. Attached as an appendix to this judgment is a pedigree table which shows the relationship of the parties. The common ancestor Sardar Mihan Singh had three sons, Sahib Singh, Sukha Singh and Mahtab Singh. Sahib Singh died about *Sambat* 1890 leaving a son, Gurdit Singh, who had two wives, Mussammatt Ganesh Devi and Mussammatt Nand Kaur. By his first wife, Mussammatt Ganesh Devi, he had a son Partap Singh, who had predeceased him, leaving a widow Mussammatt Jai Kaur and two daughters, Mussammatt Gahan and Mussammatt Lachmi. Mussammatt Ganesh Devi had also a daughter, Mussammatt Hukam Devi, who left a son Devi Dial, who is defendant No. 1 in this case. Mussammatt Gahan, daughter of Partap Singh, left a son Sant Ram, who is defendant No. 2.

Sukha Singh, the second son of Sardar Mihan Singh had four sons, Jodh Singh, Wir Singh, Sham Singh and Ganda Singh, plaintiff No. 1. Sobha Singh is a son of Sham Singh and plaintiffs Nos. 2 and 3, Sher Singh and Natha Singh, are the son and grandson respectively of Wir Singh. Jodh Singh has left descendants, some of whom are *pro forma* defendants in the case.

Mahtab Singh, the third son of Sardar Mihan Singh, had two sons Dal Singh and Gurmukh Singh, of whom the latter is said to have left Eminabad more than forty years ago and settled in Gujranwala. His sons have been impleaded as *pro forma* defendants.

It will be seen from the above that the plaintiffs are from among the descendants of Sukha Singh, while defendants 1 and 2, who are the principal defendants in the case, are descended from Sahib Singh. Defendant No. 3 Ram Singh is a brother of Mussammatt Nand Kaur, widow of Gurdit Singh and he is the only party who is not a member of Sardar Mihan Singh's family. The plaintiffs sued defendants Nos. 1 to 3 for a two-third share of the *haveli* in dispute substantially on the following allegations:—

- (1) That the *haveli* in question had been built, owned and left by Sardar Mihan Singh, the common ancestor of the parties.

- (2) That the three sons of Mihan Singh were members of a joint Hindu family and as such were joint owners of the said *haveli*. More than forty years ago, Gurmukh Singh, son of Mahtab Singh exchanged his one-third share in the *haveli* with the one-third share held by Sahib Singh, son of Gurdit Singh in another ancestral *haveli* situate at Gujranwala, with the result that Gurdit Singh became owner of two-third share in the *haveli* in question, while the descendants of Sukha Singh became owners of the remaining one-third share. The descendants of Gurdit Singh and Sukha Singh, however, continued to reside in the *haveli* as members of a joint Hindu family.
- (3) That Gurdit Singh before his death more than thirty-five years ago executed a will in respect of his property in favour of his two widows, Mussammat Ganesh Devi and Mussammat Nand Kaur, and his widowed daughter-in-law, Mussammat Jai Kaur, and under that will the said widows held the estate left by Gurdit Singh in lieu of their maintenance one after the other, the last surviving widow being Mussammat Nand Kaur who died a few months before suit.
- (4) That the *haveli* in dispute was the joint property of the descendants of Sahib Singh and Sukha Singh, who constituted a joint Hindu family and had always been held and treated as such, that according to Hindu Law and custom the plaintiffs, who are the collaterals of the late Gurdit Singh and co-sharers in the *haveli* in question, were entitled to the possession of the two-third share left by the above mentioned widows and that defendants Nos. 1 to 3 had no right in the presence of the plaintiffs to the said *haveli* and were in unlawful possession of the same.

In answer to the plaintiff's claim Ram Singh, defendant No. 3 pleaded that he was not in possession of any part of the *haveli* and that he had been sued without just cause. Defendants 1 and 2, who have contested the suit throughout, filed a written statement traversing the material allegations contained in the plaint, and pleaded in effect that the *haveli* in dispute had been built, not by Sardar Mihan Singh the common ancestor of the parties, but partly by Sardar Sahib Singh and partly by

his son Sardar Gurdit Singh, that the portion of the *haveli* occupied by the descendants of Sukha Singh had been given to Sukha Singh by Sahib Singh for purposes of residence; that Gurdit Singh and Sukha Singh, and after their respective deaths their heirs and descendants were not members of a joint Hindu family holding the *haveli* in question in joint ownership as co-parceners; that under the will of Gurdit Singh executed by him in 1862, his widows and his daughter-in-law had become exclusive owners of the portion of the *haveli* in suit, their possession not being merely in lieu of maintenance for their respective lives; that the widows had from time to time alienated certain portions of the *haveli* in exercise of their rights of ownership; that the plaintiffs and their predecessors-in-interest had by their conduct recognised the widows' exclusive ownership in the *haveli* in dispute and were, therefore, debarred from claiming the same as part of the property of a joint family; that the parties were bound by Hindu Law, under which defendant No. 1, as daughter's son of Gurdit Singh, and defendant No. 2 as his great-grandson, succeeded to the *haveli* in dispute in preference to the plaintiffs. In replication the plaintiffs varied their original allegation in the plaint as to the construction of the *haveli* by saying that it was built jointly by Sardar Sahib Singh and Sardar Sukha Singh with the money of Mussammrat Mai Maina Devi, widow of Sardar Miham Singh. They, however, reiterated their original allegations to the effect that the *haveli* was the ancestral property of the parties in which Gurdit Singh had a two-third share and Sukha Singh one-third share; that the whole *haveli* had been held and occupied as the undivided property of a joint Hindu family; that though shares in the *haveli* had been allotted as aforesaid there had been no separation of those shares by partition; that the will of Gurdit Singh had not affected the joint character of the *haveli*, the widows having had only a life interest in the same under that will; that under Hindu Law and the custom applicable to the parties the plaintiffs had a preferential right of succession to the *haveli* in dispute as against the contesting defendants; and that the plaintiffs had not abandoned their rights in the lifetime of the widows.

Upon the pleading of the parties the District Judge framed eight issues which are set forth in his judgment.

The more material of those issues are the first four, which run as follows:—

- (1) Did any portion of the *haveli* known as *haveli* Malwian belong to the late Sukha Singh, son of

Sardar Mihan Singh ? And if so, in what capacity ?

- (2) In case he owned it as heir to Sardar Mihan Singh did he not get his one-third share partitioned in the life-time of Sahib Singh ?
- (3) Are the parties governed by custom ?
- (4) If they are governed by Hindu Law, cannot the defendants, Devi Dial and Sant Ram, be given priority to the plaintiffs ?

On the first issue the District Judge held that the *haveli* Malwian had been built by Sahib Singh and not by Mihan Singh ; that the portion of it which was occupied by Sukha Singh's descendants, had been gifted to Sukha Singh by Sahib Singh ; and that, therefore, the two-thirds share of the *haveli* in dispute could not be treated as part of the undivided property of a joint Hindu family. He further held, that on the facts found by him, the principle of survivorship could not apply to a case of this kind, and that plaintiffs as descendants of the donee, Sukha Singh, could not claim possession of any portion of the *haveli* from the defendants. On this view of the case, a finding on issue No. 2 was unnecessary and was not recorded. On the third and fourth issues the District Judge held that the parties, who were high caste *Khatris* and residents of a town, were governed in matters of succession by Hindu Law and not by custom, and that under Hindu Law the defendants excluded the plaintiffs from succession to the property in suit. On the seventh issue, which related to the alleged acquiescence of the plaintiffs in the exclusive title of the widows to the *haveli* in suit, the District Judge found in defendants' favour, holding that alienations of different portions of the *haveli* had been made by the widows to the knowledge of the plaintiffs and their predecessors in interest. On these findings, the plaintiffs' suit has been dismissed.

In appeal the points raised before the District Judge have been argued before us at considerable length on both sides, and after giving our best consideration to the arguments advanced, we think that the decree passed by the District Judge is correct and must be upheld. On the view that we take of the case, it is unnecessary to decide definitely whether the *haveli* in question was built by Sardar Mihan Singh, the common ancestor of the parties, or by his eldest son, Sardar Sahib Singh, though we are inclined to agree with the District Judge, that it was built by Sahib Singh. In our opinion, even if the *haveli* was built by Sardar Mihan Singh and, therefore, his three

sons—Sahib Singh, Sukha Singh, and Mahtab Singh—inherited it as joint property in their capacity of members of a joint Hindu family, there was a disruption of the joint family followed by a division of the *haveli* between the co-owners in the life-time of Gurdit Singh more than 40 years before the date of suit ; and everything on the record points to the portion of the *haveli* now in dispute having been treated ever since as the separate and exclusive property of Gurdit Singh and of his heirs and descendants. The plaint and the plaintiffs' replication go a great way to support this view. In paragraph 2 of the plaint it is admitted that more than 40 years ago Sardar Gurmukh Singh, the only son of Mahtab Singh (who was third son of Sardar Mihan Singh), had abandoned his own share in the *haveli* in question in favour of Gurdit Singh, after taking in exchange one-third share of the latter in the ancestral *haveli* at, Gujranwala ; and it is stated that in consequence of this exchange Gurdit Singh became owner of a two-thirds share in the Eminabad *haveli*, Sukha Singh's descendants becoming owners of the remaining one-third share. Reference is also made in the plaint to the will executed by Gurdit Singh in favour of his widows, which is dated the 16th November 1862 (page 15 of the paper-book), and though Gurdit Singh died admittedly more than 35 years ago, his widows and his daughter-in-law have admittedly remained in possession of the said two-thirds share during their respective lines, the plaintiffs and the other descendants of Sukha Singh, who are fairly numerous, being content with the one-third share which Sukha Singh occupied in the life-time of Gurmukh Singh. In their replication also the plaintiffs concede that Gurdit Singh gave his one-third in the *haveli* at Gujranwala to Gurmukh Singh and took his one-third share in the *haveli* in question by way of exchange as a result of which he became owner of two-thirds share in the latter *haveli*, while the descendants of Sukha Singh became owners of the remaining one-third share (page 46). They further admit, that they had all along been in possession only of the said one-third share ; and though they add that " shares were allotted on account of a large number of family members," they do not make any attempt to explain why, after the death of Gurdit Singh his two widows and his daughter-in-law alone continued to occupy two-thirds share of the *haveli* as before, and why their own branch, consisting as it did of a large number of members, contented itself with occupying the one-third share which Sukha Singh had originally occupied. No doubt, both in the plaint and in the replication, the plaintiffs insist upon the whole *haveli* having remained throughout the

undivided property of their alleged joint family; and in their replication they even say that the descendants of Gurdit Singh and Sukha Singh have been in proprietary possession of the *haveli* "without specification of shares." But the facts admitted in the pleadings clearly amount to a separation of interests in the *haveli* in question, and there is ample evidence on the record to which we shall presently refer, of the actual separate enjoyment by the heirs and descendants of Gurdit Singh and of Sukha Singh, respectively, of the two-thirds share and one-third share above referred to, the two branches of the family having been also separate both in food and residence at least ever since the death of Gurdit Singh and very possibly since the death of Sahib Singh.

The principles which govern the partition of joint property belonging to an undivided Hindu family have been laid down in several decisions of Their Lordships of the Privy Council; and the question for decision in cases like the present is whether or not, with reference to those principles, the facts of the case in hand establish such a separation of interests between the various members of a joint family as regards the particular piece of property in dispute as would amount to a division of the same without actual partition of it by metes and bounds. In the leading case of *Appovier v. Rama Subba Aiyar* (1) Their Lordships of the Privy Council laid down the law in effect as follows:—"When the members of an undivided family agree "among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain "defined shares, then the character of undivided property and "joint enjoyment is taken away from the subject matter so "agreed to be dealt with; and in the estate each member has "thenceforth a definite and certain share which he may claim "the right to receive and enjoy in severalty, though the property "itself has not been actually severed or divided." There may be a division of title, without division of the subject to which the title is applied; a division of the right without a division of the property by actual partition by metes and bounds. In the later case of *Doorga Pershad v. Mussanmat Koondun Kowar* (2) Their Lordships say that the fair inference from the decision in *Appovier's* case seems to be that inasmuch as there may be a division of the kind there spoken of—*viz.*, a division which, though not carried out by a partition by metes and bounds, would nevertheless alter the *status* of the family, the question

(1) (1866) 11 Moo. I. A. 75.

(2) (1873) 13 B. L. R. 235.

in every particular case must be one of intention, whether the intention of the parties, to be inferred from the instruments which they have executed and the acts they have done, was to effect such a division.

In a recent case, *Balabux v. Rukmabai* (1), in which the plaintiff, a Hindu, claimed to be entitled on the death of his uncle in 1882 to the property of a joint family by right of survivorship, one of the members of which had separated himself in 1869, and no agreement by the other members to remain united or to re-unite had been proved, the Judicial Committee laid down the law as follows :—" There is no presumption when one " co-parcener separates from the others that the latter remain " united. Where it is necessary, in order to ascertain the share " of the outgoing co-parcener, to fix the shares which the others " are, or would be, entitled to, the separation of one may be said " to be the virtual separation of all. And an agreement amongst " the remaining co-parceners to remain united or to re-unite " must be proved like any other fact." In another case reported as *Balkishen Das v. Ram Narain Sahu* (2) Their Lordships of the Privy Council were of opinion that an *iqrar-nama* executed by the members of a joint Hindu family which stated in clear terms that defined shares in the whole joint property had been allotted to the several co-parceners, had the effect in law of causing a separation in estate and interest between all the co-parceners; and following the principle laid down in Appovier's case, they ruled that the property of the joint family had been divided by the allotment to them of defined shares by the *iqrar-nama*. The whole question of the partition of joint property held by an undivided Hindu family by allotment of defined shares to its members without actual partition by metes and bounds was again considered by the Privy Council in a very recent case reported as *Parbati v. Nannihal Singh* (3). In their judgment in that case, Their Lordships re-iterated the principles laid down in Appovier's case and in the case of *Balkishen Das v. Ram Narain Sahu* (2) above referred to, and held that an agreement between the members of a joint Hindu family, whether oral or in writing, to hold and enjoy their joint property in certain defined shares which agreement was duly acted upon, as evidenced by the transactions and conduct of the members of the family with respect to the management of their property, has the effect of partitioning the same, though no actual division by metes and bounds is established. Referring to Appovier's case and the case of *Balkishen Das* (2), Their Lordships observed in their judg-

(1) (1903) I. L. R. 30 Cal. 725 (P. C.). (2) (1903) I. L. R. 30 Cal. 738 (P. C.).
(3) (1909) I. L. R. 31 All. 412 (P. C.).

ment. "In both these cases the members of a joint Hindu family, some of them being minors, acting by and through their parents, executed instruments in writing providing, in the first case, that part, and in the second case, that the whole of the joint family property should belong to and be enjoyed by the different members of the family in specified shares. The effect of this was held to be that, as to the property so dealt with, there was a division of rights; the *status* of the family was changed; the tenancy of the property served and converted from something, to use the language of English Law, like a joint tenancy into a tenancy in common, and the previously undivided family became by operation of law divided." (See page 421 of the report). After quoting some passages from the judgments in the above mentioned cases, Their Lordships observed, "There is not a suggestion in either of the above mentioned judgments that the agreement to partition the joint family property in interests and right must be embodied in a deed or instrument in writing. It might be a parole agreement." In another part of the judgment, in discussing the documentary evidence adduced to show, that there had been a disruption of the joint family and a separation of interest as regards the property held by it, Their Lordships say: "But of the numerous documents given in evidence many are absolutely inconsistent with the continuance of the family as a joint Hindu family owning the family property jointly; none are inconsistent with the partition, in interest and right, of that property in the manner indicated in the petition; and some are inexplicable on any other assumption."

"If there be one thing more than any other, inconsistent with the existence of a joint Hindu family, it is that the eldest male, and manager for the family, should treat one member as the owner of his share of the entire property, and account with that member for the income of the property on that basis."

Again at page 428, Their Lordships say: "It is unnecessary to examine all the other documents in the case. Few, if any, of them are inconsistent with the defendant's case; many of them are quite inconsistent with that of the plaintiff. The High Court examined them in great detail. They deal with them, however in what, in Their Lordships' opinion, was an erroneous method. They apparently only considered whether each document was by itself sufficient to rebut the *primâ facie* presumption that as the plaintiff's family were admittedly a joint Hindu family

“before 1861, it continued to be joint, and omitted to take into account this cumulative effect of all these documents.”

We now proceed to consider whether or not, with reference to the principles laid down and the observations made by the Judicial Committee of the Privy Council in the above-mentioned cases, the two-thirds share of the *haveli* in dispute can be held to be the separate property of Gurdit Singh's branch; for it is obvious that, if it can be so held, the plaintiffs who are descended from Sukha Singh, would have no right to succeed to the said share in the presence of Gurdit Singh's daughter's son, defendant No. 1, unless the latter were excluded from succession by some custom at variance with Hindu Law.

As we have already observed, according to the plaintiff's own admission, the two-thirds share of the *haveli* in suit has been in possession of Gurmukh Singh's branch ever since Gurmukh Singh exchanged his one-third share in the Gujranwala *haveli*, with his one-third share in this *haveli*, and it is admitted that after the death of Gurdit Singh his two widows Mussammat Ganesh Devi and Mussammat Nand Kour and his widowed daughter-in-law, Mussammat Jai Kaur, occupied the portion in dispute, and that after the death of the last surviving widow it has been in the possession of defendants Nos. 1 and 2. There is important evidence on the record to prove that Gurdit Singh and after his death, his two widows treated the two-thirds share of the *haveli* as their exclusive property, and that the plaintiffs have acquiesced in the exercise by them of rights of ownership in respect of the same. On the 16th November 1862 Gurdit Singh executed a will in favour of his two widows and his widowed daughter-in-law (page 15 of the paper-book), and in that will he refers to the portion of the *haveli* which is now in dispute as his own exclusive property. No doubt the recitals in that will are in no way binding on the plaintiffs, but the important point to note is, that in that will, which is the only document executed by Gurdit Singh in which he refers to the nature and extent of his own interest in the *haveli* at Eminabad, and of the existence of which, as appears from the plaint, the plaintiffs were fully aware, the two-thirds share now in question is claimed by Gurdit Singh as his separate property, and no steps whatever have ever been taken by the plaintiffs to contest that claim. The only reasonable inference that can be drawn from the conduct of the plaintiffs in relation to the will in question is that they were aware that a separation of interest had taken

place between the members of the family as regards the Eminabad *haveli* which amounted to a partition of the same, though no actual division by metes and bounds had taken place. After the death of Gardit Singh, they allowed the widows to hold and enjoy the two-thirds share in dispute in accordance with the directions contained in the will, and both the members of the family and outsiders treated the widows as exclusive owners thereof and dealt with them on that basis. On the 6th September 1875 Mussammatt Ganesh Devi, Mussammatt Nand Kaur and Mussammatt Jai Kaur sold to Nihal Singh, brother of plaintiff No. 1 (who is defendant No. 4 in this case), a portion of the *haveli* in their possession known as Mastgarh; and the vendee, Nihal Singh, subsequently sold that portion to one Lala Amar Nath. In the sale-deed the widows claim to be owners of Mastgarh by right of inheritance, and the boundaries of the property sold, as contained in the deed, show that they also claim to be exclusive owners of the big *deorhi* to the north and refer to the southern portion of the *haveli* as belonging to Sardar Sukha Singh. No objection whatever to this sale was made by any member of the family, and the sale in question remains unchallenged up to the present moment. On the 24th December 1876 Sobha Singh, plaintiff, executed a written lease in favour of Mussammatt Nand Kaur in respect of a portion of the *haveli* consisting of one *dalan* and two *kothries* on an annual rental of Rs. 2. In that lease Sobha Singh refers to Mussammatt Nand Kaur as owner of the house and agrees to vacate the same on due notice being given by her for the purpose. The execution of this lease is admitted by Sobha Singh (page 59). On the 31st *Baisakh*, *Sambat* 1935 (*A. D.* 1878), Sobha Singh, plaintiff, sold a one-twelfth share of a *tavela*, which was admittedly part of the *haveli*, to his own brother Nihal Singh, and in the sale-deed he refers to himself as the owner of the share sold, one of the boundaries of the same being entered as the *tavela* of the heirs of Sardar Gardit Singh, deceased. On the 17th May 1897 three sale-deeds were executed by different members of the plaintiffs' branch of the family in respect of different shares in the *tavela*—*viz.*, one-sixth share by Nihal Singh, one-eighth share by Sher Singh (plaintiff No. 2), and one-twelfth share by Hakim Singh, son of Jodh Singh, the vendees in each sale being Diwans Anant Ram and Amar Nath. Each vendor refers to the share sold by him, as the share to which he is entitled as owner in his own right; and it is noteworthy that the northern and the southern boundaries of the shares sold are put down in each deed as respectively the house of the heirs of Sardar Gardit Singh and the *deorhi* of the

said house. On the 19th September 1882 one Islam took a lease from Mussammat Jai Kaur and Devi Dial, defendant No. 1, of a portion of the *haveli* known as *dharmsala* (page 14), and Sobha Singh, plaintiff, admits that he wrote the deed of lease on the record (page 48). Lastly, Ganesh Das, witness, proves that he wrote a lease, dated the 4th July 1888, on behalf of one Jumma in favour of Mussammat Nand Kaur, Mussammat Jai Kaur and Devi Dial in respect of a *kothri* in the big *deohri* of the *haveli* which Jumma had taken on rent.

The above-mentioned documents taken together lead irresistibly to the conclusion that there had been a disruption of the joint family of the parties in the life-time of Gurdit Singh, and that though there may have been no actual division of the Eminabad *haveli* by metes and bounds, there took place a separation in interest and right as regards this *haveli* between Gurdit Singh and Sukha Singh, and that thenceforth it was the subject of ownership in certain defined shares, with the result that the character of undivided property and joint ownership was taken away from it. On the one hand, the widows and daughter-in-law of Gurdit Singh held, enjoyed and dealt with the portions of the *haveli* included in their two-thirds share, which they have always been in possession of, as their exclusive property; and, on the other hand, the descendants of Sukha Singh treated their own one-third share, including parts of the *tavela* attached to the *haveli* as their exclusive patrimony and dealt with it on that basis. From the circumstances and the facts of the case, we are, therefore, justified in concluding that in the life-time of Gurdit Singh there must have been an agreement between him and Sukha Singh and Gurmukh Singh, son of Mahtab Singh, to partition the Eminabad *haveli* in interest and right; and as laid down by Their Lordships of the Privy Council, such partition is in law as effectual as a partition by metes and bounds of undivided property held by the members of a joint Hindu family. Further, in the words of Their Lordships in *Parbati v. Naunihal Singh* (1) “of the numerous documents “given in evidence many are absolutely inconsistent with the “continuance of the family as a joint Hindu family, owning the “family property jointly, none are inconsistent with the partition “in interest and right of that property * * * and some are “inexplicable on any other assumption.” As Their Lordships observe in the same case, each document discussed above may not be sufficient by itself to rebut the *prima facie* presumption that as the parties’ family was originally a joint Hindu family

(1) (1909) I. L. R. 31 All. 412 (P. C.).

it continued to be joint but the cumulative effect of all these documents is overwhelming; and the only conclusion that can be reasonably drawn from the facts proved in this case is, that there was a disruption of the family more than forty years ago, accompanied by a division of the *haveli* in question in interest and right, which took away from it the character of joint property. On the death of Gurdit Singh, therefore, the plaintiffs were not entitled to the two-thirds share in suit by right of survivorship under Hindu Law, and they were excluded from succession by Gurdit Singh's daughter's son, defendant No. 1.

It now only remains to consider whether in matters of succession the parties are governed by any custom at variance with Hindu Law, for if no such custom is established Hindu Law must govern this case.

In this connection, we have to observe that in their plaint the plaintiffs have relied on both Hindu Law and custom as furnishing the rule of decision as regards their alleged right to succeed to the *haveli* in dispute, and in their replication they took up the same position appealing both to the principles of Hindu Law as expounded by Mayne in his "Hindu Law and Usage" and to the *Riwaj-i-am* of the Gujranwala *Tahsil* prepared at the Settlement of 1867 (page 46 of the paper-book). On the other hand, the defendants both in their written pleas and in their oral statements said that they were bound by Hindu Law and not by custom. On the issue framed in this connection, the District Judge has held that the parties are governed by their personal law and not by custom; and we have no hesitation in agreeing with him in that view. The parties are Sehgal Khatriis residing in a town; they own no agricultural land and have never carried on agriculture as a means of livelihood; and the property in suit is a *haveli* situate in a town. Under these circumstances, the *onus* lay on the plaintiffs of proving that they were governed, not by Hindu Law, but by custom, and we do not think that that *onus* has been discharged by them. The *Riwaj-i-am* of the Gujranwala District prepared at the Settlement of 1867, on which the plaintiffs rely, governs agricultural Khatriis and not the parties who have no connection whatever with agriculture and live in a town; and for the same reasons the *Wajib-ul-arz* of *manza* Eminabad prepared in 1856 cannot be held to govern the succession to the property in question. No instances of any value in support of the applicability of custom to the Sehgal Khatriis regarding right of succession to non-agricultural pro-

perty, such as the *haveli* in suit, have been cited, the balance of oral evidence on the question under consideration being, on the whole, in favour of the contesting defendants' position.

On behalf of defendant-respondent No. 3, Ram Singh, it has been urged by Khawaja Zia-ud-Din that his client was impleaded as a defendant in this case quite unnecessarily, as he had never been in possession of any part of the *haveli*. We notice that Ram Singh disclaimed all interest in the subject-matter of the suit in his pleas and no evidence whatever was adduced by the plaintiffs to show that he had any interest in the same and that it was necessary for them to sue him as a defendant. In the appeal also he has been made a respondent without just cause; and, therefore, apart from the merits of the case, the appeal as regards him must fail and is hereby dismissed, and he will get his costs in both the Courts.

For the above reasons, we hold that the plaintiffs-appellants have failed to prove that they are entitled to succeed to the two-thirds share of the *haveli* in dispute to the exclusion of defendants-respondents Nos. 1 and 2, and maintaining the decree of the Lower Court, we dismiss this appeal with costs throughout.

Appeal dismissed.

No. 39.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice
Shah Din.

SAWAN SINGH—(DEFENDANT)—APPELLANT

Versus

JAFAR KHAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 19 of 1909.

Custom—alienation—village abadi—right of qabza maliks to sell their houses.

Held, that a *malik qabza*—having full proprietary rights over the cultivated lands in his possession as *malik* (owner)—has presumably the same rights (in the absence of proof to the contrary) over his house in the village site (*abadi*), and that therefore the *ala maliks* have no right to interfere with the sale of such a house.

Held also, that an entry in the *Wajib-ul-arz* restricting the powers of non-proprietors in regard to their houses has no application to *qabza maliks*.

67 P. R. 1869 (*Kirpal Singh v. Kesree*) (1), referred to.

Further appeal from the order of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Jhelum Division, dated the 4th April 1908.

Nanak Chand and Sukh Dial, for appellant.

Muhammad Iqbal, for respondents.

The judgment of the Court was delivered by—

ROBERTSON, J.—In this case one Khuda Bakhsh, a *malik* 5th January 1912, *qabza* in the village of Pinnanwah, has sold his house to one Sawan Singh. The sole question which we have to decide is whether Khuda Bakhsh was a proprietor of such a nature that he could alienate his house to a third party. The suit is brought by the full proprietors of the village, claiming the right to an entry upon Khuda Bakhsh's house upon his surrender of it by sale.

We must note to begin with that both the Lower Courts seem to have been under some misapprehension as to the nature of the status of the *malik qabza*. As regards the lands held by a *malik qabza* he is usually in the same position as a full proprietor in a village, with the exception that he sometimes has to pay *malikana* to such proprietors and that he has no share in the *shamilat* land in the village. At page 63 of the Jhelum Settlement Report by Mr. Talbot, a description of the tenure of *malik qabza* will be found. The assumption therefore that because non-proprietors may be presumed to

have no rights to alienate more than the materials of their houses it must be presumed that *malik qabza* has no such power, is not sustainable. The question is, the status of a *malik qabza* being clearly inferior to that of a full proprietor and equally clearly superior to that of a tenant or a non-proprietor, has he in this instance the power to alienate his house in the village site (*abadi*) ? The plaintiffs rely largely upon an entry in the *Wajib-ul-arz* of 1880. That entry provides that non-proprietors shall have no power to dispose of the sites upon which their houses stand but only of the *malba* under certain conditions. The *qabza maliks* not being non-proprietors do not, in our opinion, come within the purview of this clause in the *Wajib-ul-arz*. Some reliance was also placed upon an entry in the *khassra abadi* of 1860, but it is clear from a *robkar* attached to that document, the preparation of which has been declared to have been unauthorised, that no weight can be attached to it.

For the defendants a statement made by the father of Fazal Dad, plaintiff, by name Mahla Khan, is brought to our notice. In this statement Mahla Khan himself clearly differentiates between the rights or rather absence of rights of a *qabza malik* to sell his house and site, and those of a tenant or non-proprietor. Moreover in the signatures at the end of the *Wajib-ul-arz* itself the *qabza maliks* are shown amongst the *maliks* or proprietors and not amongst the tenants or non-proprietors. There is an absence of actual judicial authority on the point. In No. 67 P. R. 1869 (*Kirpal Singh v. Kesree*) (1) it seems to have been assumed as a matter of course that the rights of a *qabza malik* over his house in the *abadi* would be the same as his rights over the cultivated land in his *milkiyat*. This was not an actual point for decision in that case. Neither side could quote to us any decision of this Court, in which the actual point now before us was brought under discussion. It appears to us however natural to presume that a *malik qabza*, having full proprietary rights over the cultivated lands in his possession as *malik*, will have the same rights, in the absence of any proof to the contrary, over his house in the *abadi*. It is in fact now very seldom that we find the entire village site "*abadi*" to be held in common as *shamilat deh*. The various proprietors very frequently own their own houses—even where parts of the *abadi* are still held in common, and in this case it has not been suggested, that the whole of the village *abadi* is still undivided *shamilat deh* of the original proprietors. This being so, we see no reason to differenti-

ate between the powers of the original proprietors over their buildings and sites in the *abadi* and the powers of the *qabza maliks*, over such houses and sites as they possess. The materials for coming to a decision are not very plentiful. Such as they are they lead us to the conclusion which we have expressed above.

We accordingly accept the appeal and dismiss the claim with costs throughout.

Appeal accepted.

No. 40.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

RAJA—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT JANNAT BIBI AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No. 438 of 1909.

Custom—alienation—gift to minor daughter—completion of gift by possession—right of daughter's husband (a khana-damad) to retain property for his life after her death—Gujars of Gujrat District.

Held, that when a gift has been made to a minor daughter—for whom the donor acted as guardian, the daughter's husband cultivating the donor's land and living with him in his house and being regarded at the time in the light of a son and the donor had openly affirmed the gift in a Court of law, shortly after which he died (his death being probably the reason why mutation of names had not been effected)—formal delivery of possession was not essential to the completion of the gift.

45 P. R. 1881 (*Gul Ahmed v. Sahib Zada*) (1), 86 P. R. 1882 (*Gulam Muhammad v. Muhammad Amin*) (2), 91 P. R. 1883 (*Faujdar v. Bhamma*) (3), 36 P. R. 1891 (*Ahmad Khan v. Mussammat Ghulam Bibi*) (4), 98 P. R. 1895 (*Khan v. Hira*) (5), and 106 P. R. 1901 (*Samman v. Ala Bakhsh*) (6), referred to.

Held also, that among tribes which recognise the custom of *khana-damad* (such as Gujars of the Gujrat District) the object of a gift to a daughter is to benefit both the daughter and her *khana-damad* husband and any issue of theirs and consequently the husband is entitled to hold the gifted property for his life after the death of his wife without issue, although she predeceased her father (the donor).

12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*) (7), 22 P. R. 1893 (*Ghulam Bhikh v. Massania*) (8), 54 P. R. 1897 (*Bhotu v. Lehru*) (9), 134 P. R. 1894 (*Mahla v. Shah Muhammad*) (10), 39 P. R. 1905 (*Narab Khan v. Kallu Khan*) (11), followed.

(1) 45 P. R. 1881.

(2) 86 P. R. 1882.

(3) 91 P. R. 1883.

(4) 36 P. R. 1891.

(5) 98 P. R. 1895.

(6) 106 P. R. 1901.

(7) 12 P. R. 1892 (F. B.).

(8) 22 P. R. 1893.

(9) 54 P. R. 1897.

(10) 134 P. R. 1894.

(11) 39 P. R. 1905.

Further appeal from the order of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated the 13th March 1909.

Muhammad Shafi, for appellant.

Shadi Lal, for respondent.

The judgment of the Court was delivered by—

6th January 1912.

RATTIGAN, J.—The parties are Gujars of *manza* Bawali Kalan, *tahsil* Kharian in the Gujrat District, and on the 15th February 1907 Khuda Bakhsh executed and registered a deed, described as a *hibanama*, in favour of his daughter, Mussammat Fateh Bibi, a young girl, aged about twelve who was married to the present plaintiff, Raja. In this deed Khuda Bakhsh declared that as he had no son and had no hopes of ever having a son, he had made his daughter his sole heiress in respect of his house and land property and in explanation of his action, he pointed out in the same deed that his daughter and her husband were living with him and that her *doli* had never left his house.

This so called *hibanama* is, in terms, really a will but it was apparently regarded at the time by all concerned as a gift in *presenti* of the whole of its author's immoveable property and as a result, the latter's collaterals forthwith instituted a suit against Khuda Bakhsh and his said daughter (for whom her father acted as guardian *ad litem*) and prayed for a declaration that the gift would not affect their reversionary rights, Khuda Bakhsh contested that claim and in his written statement pleaded that his daughter was married to Raja and that the latter was his *khana-damad*, and that the gift in her favour was therefore valid by custom. After issues were drawn, the parties arrived at a compromise, the terms of which were as follows :—

“ The gift in respect of all the *houses* in suit in favour of
“ Mussammat Fateh Bibi shall stand, while the gift in her
“ favour in respect of the *land* shall stand to the extent of
“ one-third only and she shall be owner thereof. The gift in
“ respect of the remaining two-thirds of the land shall stand
“ cancelled and Khuda Bakhsh, donor, shall remain in posses-
“ sion of the said two-thirds during his life-time. After his death
“ the said two-third shall descend to his son, if any, and in
“ default to his reversionary heirs.”

Khuda Bakhsh was examined by the Court with regard to the terms of the said compromise and repeated the provisions of the written agreement. The suit was accordingly decided in accordance with the said terms.. A few months later Mus-

sammāt Fateh Bibi died without issue and as occasionally happens in such cases, the father-in-law and son-in-law fell out, the result being that the latter instituted the present suit against the former and claimed possession of the houses and one-third of the land which had (as he alleged) been gifted to his wife. Plaintiff's contention is that the gift in favour of his wife was complete and that as he himself was the *khana-damad* of the donor, he was entitled to succeed on a life tenure to the property which had been given to her. Khuda Bakhsh in reply to the present claim pleaded (in direct opposition to his pleas in the previous suit) that plaintiff was not his *khana-damad*; that there had been no gift in favour of Mussammāt Fateh Bibi but merely a will in her favour, to take effect after his death; and that his daughter had not obtained possession of the property now in suit.

Shortly after the institution of the suit, Khuda Bakhsh died and his two widows were brought upon the record as his legal representatives. The Munsif, 1st class, framed four issues and upon them decided :—(1) that Khuda Bakhsh had taken plaintiff into his house as *khana-damad*; (2) that as Khuda Bakhsh was now dead, it was immaterial whether the alienation made by him was a gift or a devise, as in either event plaintiff would be entitled to succeed; (3) that the *razinama* in the previous suit modified the terms of the *hibanama* of the 2nd July 1907 and gave Mussammāt Fateh Bibi possession of the houses and one-third of the land and that as the donee and her husband continued to live with the donor, it was not necessary for the completion of the gift that formal possession should be delivered to the donee; and (4) that plaintiff was clearly entitled (upon the authority of 134 P.R. 1894) to possession of the property in suit. The suit was accordingly decreed with costs. Defendants appealed to the Divisional Judge, who in a somewhat brief judgment reversed the decree of the Munsif and dismissed plaintiff's suit. The learned Judge held that the *hibanama* of the 2nd July 1907 was not a gift in *presenti* but a will and that the *razinama* provided that after Khuda Bakhsh's death, two-thirds of the land was to go to the reversioners and one-third to the daughter. He accordingly was of opinion that "both arrangements were in the light of a will" and that it was open to Khuda Bakhsh to "change" these arrangements at pleasure, especially as the arrangements were intended solely for the benefit of his daughter who had died. As Khuda Bakhsh had revoked the arrangements and as he had never divested himself of his vested interests in the property, the learned Judge held

that plaintiff had no title or right to the property after his wife's death.

Plaintiff has preferred a further appeal to this Court and we have heard the case for appellants and for the respondents very ably set forth by their respective counsel.

Briefly summarised the arguments for the plaintiff and the respondents are as follows :—

The plaintiff it is urged that whatever may have been the effect of the *hibanama* of the 2nd July 1907, the *razinama* filed in the previous suit and the solemn statement made in Court by Khuda Bakhsh in that case proved that a present gift of the houses and of one-third of the land had been made in favour of Mussammat Fateh Bibi; that in view of the fact that the donee was a minor girl living with her father (who as head of the family would naturally act in all matters as her guardian and did in fact so act for her during the previous litigation) the mere fact that formal possession was not delivered to the girl is a matter of no consequence, especially as her husband was (according to Khuda Bakhsh's own admissions in that suit) cultivating the land for his father-in-law; that mutation was not effected owing to the death of the donee within a few months of the termination of the former litigation; and that in view of the fact that a gift was actually made to Mussammat Fateh Bibi and that her husband was at the time the *khana-damad* of the donor, the latter, on the death of his wife, became entitled to possession of the said gifted property for the period of his life-time.

On behalf of respondents, Mr. Shadi Lal joins issue upon all these points. He argues that the *hibanama* was a mere will to take effect *in future* upon the death of Khuda Bakhsh; that the *razinama* made no change in the nature of the transaction but merely limited the extent of the property which was to devolve upon the daughter; that viewed as an intended gift, the transaction was incomplete, inasmuch as it had not been followed by mutation of names or by transfer or delivery of possession; and that, in any event, the transaction, whatever it was, became infructuous in consequence of the death of the donee, without issue, in the life-time of the donor, (12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*) (1)).

The first question then before us is whether there was a gift to Mussammat Fateh Bibi of the property in suit, and if so, whether the gift was complete. Upon these points we

have no hesitation in agreeing with Mr. Shafi. As construed by lawyers, or even by educated laymen, the so-called, *hibanama* executed by Khuda Bakhsh can only be regarded as a testamentary disposition to take effect upon the death of the author. But it is clear from the conduct of all parties interested in this matter that it was regarded by them as an immediate gift, and it was upon this assumption that the collaterals of Khuda Bakhsh brought their suit for a declaration of its invalidity as against their reversionary rights. But even if we concede that the *hibanama* was in reality a will and as such operative only upon the death of Khuda Bakhsh and revocable during his life-time, we cannot agree that the *razinama*, coupled with Khuda Bakhsh's express statements in Court, in any way altered the nature of the transaction. According to the *razinama*, it was agreed that Mussammat Fateh Bibi should have possession of the houses and of one-third of the land and that this provision did not relate to events subsequent to the death of Khuda Bakhsh but to present facts, is clear from the other provision that during his life-time Khuda Bakhsh was to remain possession of the remaining two-thirds of the land. The obvious and only inference from the latter provision is that possession of the one-third of the land and of the houses was to pass at once to Mussammat Fateh Bibi; for if the intention had been to make her heiress of the latter's property on the death of her father, the latter would necessarily have continued in possession of the whole of his property as long as he lived. Khuda Bakhsh at that time was fighting strenuously on behalf of his daughter and he very naturally wished to make her position as secure as possible. It is not surprising therefore, that he decided to hand over part of the property to her during his life-time and the very fact that his collaterals accepted this condition tends to show that they recognized the very real and substantial rights which Gujars of Gujrat district concede to daughters, where husbands are residents in the houses of their father-in-law, we find, therefore, that there was an immediate gift of the property in suit to Mussammat Fateh Bibi.

The next question is whether this gift was complete, it being admitted that formal delivery of possession and mutation of names did not take place. In our opinion, the donor did everything that could reasonably be expected in the circumstances to give effect to the gift, the donee was his minor daughter and he acted as her guardian; her husband was cultivating the donor's land and was living with him in his house and was at the time regarded in the light of a son. The

donor had openly affirmed the gift in a Court of law and mutation of names would probably have been duly effected had not the donee died so soon after the termination of the previous litigation (see Nos. 45 P. R. 1881 (*Gul Ahmad v. Sahibzada*) (1), 86 P. R. 1882 (*Gulam Muhammad v. Muhammad Amin*) (2), 91 P. R. 1883 (*Faujdar v. Bhamma*) (3), 36 P. R. 1891 (*Ahmad Khan v. Mussammat Ghulam Bibi*) (4), 98 P. R. 1895 (*Khan v. Hira*) (5), 106 P. R. 1901 (*Samman v. Ala Bakhsh*) (6). There is ample authority for holding that in such circumstances formal delivery of possession is not essential to the completion of the gift and we decide accordingly that the gift was complete and irrevocable.

The final and perhaps most important question is, whether upon the assumption that there was a valid and completed transaction of gift in favour of Mussammat Fateh Bibi, the plaintiff is entitled to claim possession of the donated property for the period of his life, he being the husband of the donee and also the *khana-damad* of the donor.

Mr. Shadi Lal in support of his argument to the contrary relies upon the decision of the Full Bench, No. 12 P. R. 1892 (*Sita Ram v. Raja Ram*) (7), and upon a number of rulings of this Court to the effect that where the usage of *khana-damad* is recognised as giving rise to customary rights, the purpose is to benefit the daughter's sons, and the daughter and her husband only incidentally benefit, No. 22 P. R. 1893 (*Ghulam Bhikk v. Massania*) (8). We have considered these decisions, but we can find nothing in them antagonistic to the present claim.

The actual question before the Full Bench in the case above referred to, was whether by general custom prevalent among agricultural tribes in this Province, the collateral heirs, in his natural family of a man, who had been adopted under a customary adoption and had died without lineal heirs, succeeded to property which he had acquired or inherited by virtue of such adoption; or whether the collateral heirs of the donor could claim such property. The Full Bench held that in such a case the property reverted to the donor and his collateral heirs, and the question now before us was not decided, nor did the learned Judges express any opinion thereon.

It may be conceded that in cases where the custom prevalent in a particular tribe recognizes the usage of *khana-damad*

(1) 45 P. R. 1881.

(2) 86 P. R. 1882.

(3) 91 P. R. 1883.

(4) 36 P. R. 1891.

(5) 98 P. R. 1895.

(6) 106 P. R. 1901.

(7) 12 P. R. 1892 (*F. B.*).

(8) 22 P. R. 1893.

(and this usage certainly obtains among Gujars of the Gujrat District) the primary purpose is to benefit the issue of the daughter and her husband.' But in all such cases it is recognized that the intention is also to benefit the daughter and her husband, though only incidentally. And (as usual) there is good reason in support of this customary rule. Where the usage of *khana-damad* obtains, we find that the son-in-law practically cuts himself off from his own family. He comes to his father-in-law's house, takes up his residence there, helps his father-in-law in the cultivation of his land and to all intents and purposes identifies himself with the family of his wife. It is only natural therefore that he should be recognised by the custom of the tribe as having certain rights in the latter family and we know of no cases nor have we been referred to any, in which it had been held, that where the father-in-law has made a gift of land to his daughter, whose husband was a *khana-damad* (in the sense that that expression is understood among Gujars of Gujrat District), the husband loses all rights in the said land upon the death, without issue, of his wife in the life-time of her father.

The cases cited by Mr. Shadi Lal in support of his contention do not help him. In No. 22 P. R. 1893 (*Ghulam Bhikh v. Massania*) (1), the parties were Taoni Rajputs of the Amballa District and it was found that among them daughter's sons were not favoured by custom and the case was decided with special reference to the custom obtaining in that tribe. The same remark applies to No. 54 P. R. 1897 (*Bhotu v. Lehru*) (2), where it was held that according to the custom of the *Girhs* of Kangra District, where the wife of a resident son-in-law dies during the life-time of her father and leaves no sons, her husband on her father's death, does not succeed to the latter's immoveable property. We cannot possibly accept the proposition that a particular rule of custom found to be observed by *Girhs* of the Kangra District is to be applied to Gujars of Gujrat District.

On the other hand, the decision of this Court in No. 134 P. R. 1894 (*Mahla v. Shah Muhammad*) (3), (where the parties were *Waraiches* of this very district) is directly in point and favours the contention of the plaintiff. In this case Benton, J. remarked :—" It is in fact the residence as appointed *khana-damad* that validates the gift, as ruled in *Punjab Record* No. 39 " of 1887 and not *vice versa*. Once appointed he will continue to

(1) 22 P. R. 1893.

(2) 54 P. R. 1897.

(3) 134 P. R. 1894.

“hold until death, when he will be succeeded by his male children or it may be by another *khana-damad* duly appointed by the daughter. His tenure, according to this view, is one for life and I cannot accept the contention that it is to be cut short by the failure to beget male children, or by the decease of his wife during his life-time.....one of the cases dealt with is the case of the daughter's daughter dying without male issue before her husband. The husband is then to hold for life and to be succeeded by his father-in-law's collaterals. In accordance with this rule, in an unpublished case No. 889 of 1891 a suit by the collaterals to obtain possession of the estate in the *khana-damad's* life-time, was dismissed as premature.”

“So, in like manner, I would dismiss the present claim, holding as I have said above, that the *khana-damad's* rights are the same, however he may have been appointed, whether by gift to himself or by gift to his wife or by the expressed wishes of his father-in-law that he should succeed, the condition of residence having in all cases to be fulfilled, and that he is entitled to hold for life.”

The principle underlying these observations is in our opinion applicable to the facts of the case before us. Khuda Bakhsh appointed plaintiff his *khana-damad* and according to his own statements in the previous case he took plaintiff into his house and practically constituted him his son. He then made a gift of part of his land in favour of his daughter, plaintiff's wife, and plaintiff attended to the cultivation of the whole property of his father-in-law. The obvious intention of this gift was to benefit the daughter and her husband and any issue of theirs and we think it would be doing grave injustice to plaintiff to hold that the gift *ipso facto* terminated upon the death of the daughter without issue in her father's life-time, not only would such a decision be unjust to plaintiff, but it would in our opinion, be opposed to the spirit of the customary rule which among such tribes as the Gujars recognizes the strong claims which the *khana-damad* has upon his father-in-law, in whose house he has taken up his residence and to whom he has been rendering possibly for many years most valuable service. A gift of this kind and among such tribes as that of the Gujars is obviously intended as much for the benefit of the son-in-law as for the benefit of the wife, and frequently it is made nominally in favour of the former, see for example No. 39 P. R. 1905 (*Nawab Khan v. Kallu Khan*) (1). No doubt, in all such cases the gift is

(1) 39 P. R. 1905.

not intended to have far reaching consequences or to enure for the benefit of persons other than the daughter and her husband and their linial descendants. The collateral heirs of the husband for example would have no right to claim such property after his death without issue. But we have no hesitation in holding that a gift when made by a Gujar of the Gujrat District to his daughter, whose husband is a resident son-in-law, enures for the benefit of the latter during his life-time and this too in cases where the gift is nominally in favour of a daughter who happens to predecease her father, and to leave no issue her surviving.

We accordingly accept this appeal and reversing the decree of the Divisional Judge, we grant plaintiff the relief claimed by him. Respondents must pay costs throughout.

Appeal accepted.

No. 41.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

KAMOLA RAM AND OTHERS—(PLAINTIFFS)—
APPELLANTS,

Versus

KAURA KHAN—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1129 of 1909.

Indian Contract Act, IX of 1872, sections 12 and 65—Contract by person of unsound mind—admissibility of claim for compensation for advantage received by him.

Held that, a contract entered into by a person of unsound mind being void under section 12 of the Contract Act, section 65 of the Act does not apply to it and consequently plaintiffs' claim for a refund of sums advanced to the defendant (the person of unsound mind) must also fail.

(*Mohori Bibee v. Dharmodas Ghose*) (1), followed.

Further appeal from the order of Major B. O. Roe, Divisional Judge, Multan Division, dated the 21st May 1909.

Shadi Lal, for appellants.

Shah Nawaz, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The facts in this and in the two connected 9th January 1912. cases are fully stated in the judgment of the learned Divisional Judge. In each case plaintiffs' claim to recover principal and

interest in respect of a bond executed by defendant, Sheikh Kaura Khan, the total sum claimed in the 3 suits amounting to Rs. 9,026-13-0. The main defence in all these suits was that the bonds were executed by a person whose mind was at the time "unsound" within the meaning and for the purposes of, section 12 of the Indian Contract Act, 1872, and that consequently the so-called contract between the plaintiffs and the defendant was in law no contract at all, and plaintiffs were entitled to no relief.

The District Judge found that "the whole of the evidence for the plaintiffs is full of incidents that show that the defendant lived in a whirl of drink, drugs and excitement and that he was quite incapable of understanding business matters" and that the contract was induced by undue influence. He further found that a total sum of Rs. 1,178 had been advanced by plaintiffs to defendant on various dates and he gave the former a decree for that sum together with interest at the rate of Rs. 12 *per cent. per annum* from the date of the loan to the date of institution of the suit. From the decree defendant appealed to the Divisional Judge and plaintiffs lodged cross-objections, and the Divisional Judge remanded the case for further inquiry, as to whether defendant was of unsound mind, within the meaning of section 12 of the Contract Act, at the time when the bonds, upon which the suits were based, were executed.

Evidence was therefore taken by the Munsif with reference to this issue and as a result he reported that "it was clear that the defendant was of unsound mind" at the time.

The Divisional Judge after consideration of the whole of the evidence on the record, held that "there does not appear to be any doubt that Kaura Khan was a person of weak intellect from his birth, and this weakness of intellect developed into insanity owing to the course of debauchery in which he embarked," and that Kaura Khan was not competent to contract at the time when he executed the bonds. The learned Judge was of opinion that it was very doubtful whether the sum of Rs. 1,178 had ever been paid to defendant, but that even if it had been paid plaintiffs, whose father was the original money-lender and who must have known he was dealing with a person of weak intellect, who did not know what he was doing, were not entitled to claim recovery even of such sums as might have been advanced to defendant.

Plaintiffs' suits were accordingly dismissed in their entirety and from the decrees passed by the Divisional Judge they have

preferred further appeals in the two cases in which they claimed, respectively, Rs. 4,718 and Rs. 3,592 and they have also applied for revision of the decree in the case in which they claimed Rs. 716. This judgment will dispose of all three cases.

We have heard Mr. Shadi Lal in support of plaintiffs' contentions and we have read the evidence upon the record. There is against plaintiffs a concurrent finding of three Judges who are all agreed that the defendant was, at the time of the execution of the bonds, a person of weak intellect and quite incapable of understanding business matter. With this finding we are ourselves in entire accord, as it is abundantly proved, even by the evidence of witnesses called by plaintiffs themselves, that Kaura Khan was quite incapable of understanding the contracts made by him and of forming a rational judgment as to their effects on his interests. The evidence shows that he was naturally of weak intellect and that after the death of his father, who left him a very large property, he took to drink and drugs and indulged in other vices. In fact, he would appear to have been almost always drunk and we see no reason to differ from Divisional Judge's finding that plaintiffs' father must have known that he was practically imbecile. Plaintiffs' witness, Tikaya Ram, a drink contractor, has had to admit that about the time when defendant executed the bond of the 28th September 1902, he was "surrounded by prostitutes and "black-guards," "was usually drunk" and "used to get 2 or "3 bottles of spirit a day" and drank *bhang* as well. This witness also states that shortly after the execution of the said deed, the Deputy Commissioner was obliged to "banish" defendant from the city.

The rest of the evidence is very similar in its purport and proves conclusively that defendant was incapable of forming a rational judgment on matters of business and that all who came into contact with him (except possibly on rare and isolated occasions) must have known of his unsoundness of mind. Plaintiffs' father had frequent dealings with him and we cannot believe that he was ignorant of defendant's weakness of intellect.

We agree, therefore, with the findings of the Lower Courts upon these points.

Mr. Shadi Lal contends that in any case plaintiffs are entitled to recover sums actually advanced by them to defendant and in this connection relies upon the provisions of section 65 of the Indian Contract Act. But in a case of this kind

the decision of their Lordships of the Privy Council in *Mohori Bibee v. Dharmo Das* (1), is in point and upon its authority we hold that these provisions are not applicable and that plaintiffs' claim even for a refund of sums advanced to the defendant must fail. We accordingly dismiss this and the connected appeal and application for revision with costs.

Appeal dismissed.

No. 42.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

DHIAN SINGH—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT BELAS KAUR—(DEFENDANT)—
RESPONDENT.

Civil Appeal No. 818 of 1909.

Res judicata—question decided in previous pre-emption suit against vendee and venditor, which resulted in dismissal of the pre-emption suit—whether res judicata in subsequent suit by vendee against venditor for possession.

Plaintiff sued C. for possession of land sold to him by A. acting as attorney for his wife C. A having died since, C. was the only defendant in the case. Three persons had previously sued the plaintiff and A. for pre-emption and in this case plaintiff had admitted the rights of the claimants to pre-empt and pleaded that full consideration had passed, while C. contended that the sale was invalid as her husband had no authority to effect it. Her plea was successful in the first Court and the pre-emptor's appeal to the Divisional Court was dismissed as was also a subsequent application by them for revision to the Chief Court.

Held, that in the present suit the question whether the husband had or had not authority to effect the sale was not *res judicata* by reason of the finding on this point in the pre-emption suit.

Jamna Singh v. Kamar-un-Nisa (2), and *Krishna Chandra v. Mohesh Chandra* (3).

First appeal from the order of Rai Sahib Bhagat Narain Das, District Judge, Lahore, dated the 30th April 1909.

Sukh Dial and Mul Chand, for appellant.

Jowala Parshad, for respondent.

The judgment of the Court was delivered by—

11th Jan'y. 1912.

RATTIGAN, J.—This is a first appeal from the decree of the District Judge, Lahore, and the facts may be briefly summarized as follows :—

(1) (1903) *I. L. R.* 30 *Cal.* 539 (*P. C.*). (2) (1880) *I. L. R.* 3 *All.* 152 (*F. B.*).
(3) (1905) 9 *Cal. W. N.* 584.

On the 30th June 1902, one Bhai Hira Singh, purporting to act as the general agent of his wife, Mussammat Bilas Kaur, under a general power-of-attorney, dated the 14th January 1887, mortgaged 176 *ghumaons* 5 *kanals* and 10 *marlas* of land in *mauza* Bhanpur, in the Sharakpur *tahsil*, for a consideration of Rs. 4,500 to Dhian Singh, plaintiff. This mortgage deed was duly registered, and is printed as exhibit No. 1 at pp. 3—6 of the paper book.

On the 19th March 1903, the said Bhai Hira Singh, again purporting to act under the authority of the above-mentioned power-of-attorney, sold 200 *ghumaons* 3 *marlas* of land in the said village to plaintiff for an alleged consideration of Rs. 10,000. In the sale-deed this land (which included the area previously mortgaged to plaintiff) is described as the property of Mussammat Bilas Kaur and Bhai Hira Singh figures as her agent, duly authorised to effect the sale. This sale-deed was also in due course registered, and the consideration for the sale was stated to be (1) the sum of Rs. 4,500 due on the basis of previous mortgage-deed; and (2) the sum of Rs. 5,500 received by Hira Singh by means of a *ruqqa* drawn by one Bhai Gurdit Singh in his favour.

It appears that Hira Singh was at one time the treasurer of the *Sri Darbar Sahib* at Amritsar and that about 1867, he was convicted of embezzling the funds of that institution and sentenced to 7 years' imprisonment and to a heavy fine. He died about October 1903.

In March 1904 three persons named Lahna Singh, Chanda Singh and Dial Singh, sued for pre-emption in respect of the sale effected by Hira Singh on the 19th March 1903, and in that suit Dhian Singh (the vendee) and Mussammat Bilas Kaur were co-defendants. Dhian Singh admitted the rights of the claimants to pre-empt and pleaded that full consideration had passed, but Mussammat Bilas Kaur contended that the alleged sale was invalid as her husband had no authority to effect it.

Her plea was successful in the Court of the District Judge, and the plaintiff pre-emptor's suit was dismissed upon the ground that Hira Singh had no authority to effect the sale. The vendee, Dhian Singh, was directed to pay his own costs. The pre-emptors appealed to the Divisional Judge, but their appeal was dismissed and an application for revision preferred by them to this Court was equally unsuccessful.

On the 16th February 1907 the vendee, Dhian Singh, sued Mussammat Bilas Kaur for possession of the land sold

to him under the deed of sale, dated 19th March 1903, or in the alternative for recovery of the Rs. 10,000, alleged to have been paid by him to Hira Singh.

Mussammat Bilas Kour denied that her husband had any authority from her either to mortgage or to sell the land in dispute, or that she was liable to refund to plaintiff any sums of money which Hira Singh might have received from him. Her contention was that the sale was in fact fictitious and without consideration, and she further urged that as a result of the previous litigation, it ought to be held in the present suit that Hira Singh had no authority to sell her land, that being a question which was *res judicata* between plaintiff and herself, who were both parties to the former suit.

The District Judge held that the plea of *res judicata* as regards Hira Singh's authority to sell the property was established, inasmuch as a decision upon that question was necessary for the determination of the former suit and there was a contest between the co-defendants upon that point; (2) that upon the facts as established in the present case it was not shown that Hira Singh had any authority from his wife to sell or mortgage any part of her estate; (3) that of the alleged consideration for the sale, only the sum of Rs. 9,000 had been proved to pass, and consequently that plaintiff was not entitled to the item of Rs. 1,000 which was alleged to form part of the consideration for the mortgage of the 30th June 1902. The learned District Judge accordingly granted plaintiff a decree for recovery of Rs. 9,000 from such part of the property belonging to the deceased Hira Singh as had come into the possession of Mussammat Bilas Kaur and dismissed his suit for possession of the land.

From this decree plaintiff has preferred this appeal and Mussammat Bilas Kaur has also applied for leave to appeal *in formâ pauperis*. With the latter application we have dealt in our judgment in civil miscellaneous application 211 of 1909. For reasons therein recorded we have rejected her application, as also her prayer to be allowed an extension of time for the presentation of a regular appeal from such part of the decree as adversely affects her interests in Hira Singh's property.

Upon plaintiff's appeal the points which we have to decide are as follows:—

- (1) Is the question whether Hira Singh had or had not authority to effect the sale in dispute *res judicata* between the present parties?

- (2) If not, had Hira Singh in point of fact authority to effect that sale ?
- (3) If the above points are decided adversely to plaintiff, was the District Judge right in finding that the item of Rs. 1,000 had not been proved ?

Upon the first point we have no hesitation in holding that the matter is not *res judicata*. The present plaintiff and the present defendant were co-defendants in the former suit, and though it was not open to the former in that case to plead that there had been no sale to him and that therefore the claim for pre-emption must fail, he was clearly interested in securing the dismissal of that suit. It actually was dismissed on the plea of his co-defendant that the alleged sale was without authority. The claim for pre-emption having been dismissed, it is difficult to see, how it could have been open to the vendee to appeal from the decree, and the decision of the Full Bench of the Allahabad High Court in a case which is practically on all fours with the case before us (*Jamna Singh v. Kamar-un-Nisa*) (1), is ample authority for holding that the finding of the Courts in the pre-emption suit is not *res judicata* for the purposes of the present claim. We do not, of course, question the proposition that in certain cases it may be open to one of two or more defendants to appeal from a decree which adversely affects him, even in a case when the plaintiff's claim is unsuccessful. But as observed by the High Court of Calcutta in *Krishna Chandra v. Mohesh Chandra* (2) "the question who may appeal is determinable by the common sense consideration that there can be no appeal when there is nothing to appeal about." In the present instance, the former suit for pre-emption was dismissed and it is absurd to suppose that the vendee would appeal from the decree. What had he to appeal about ? Could he in reason be expected to invite the Appellate Court to reverse the decree of the first Court and to grant the pre-emptors a decree which would take the property away from him ? As observed by Pearson, J., in the Allahabad Full Bench case above cited "the Appellate Court could not, in disposing of the appeal, vary or reverse the decree dismissing the suit so as to make a decree declaratory of the validity of the sale in question....." The facts of that case were to all intents and purposes identical with the facts of the case before us and we entirely agree with the conclusion that the decision in the pre-emption suit that no real sale had taken place, is no bar to an adjudication upon that

(1) (1880) *I. L. R.* 3 *All.* 152 (*F. B.*).(2) (1905) 9 *Cal. W. N.* 584.

point in a subsequent suit between the vendee and the alleged vendor, though both the latter were co-defendants in the pre-emption suit. We hold, therefore, that this question is not *res judicata* for the purposes of the present suit.

[The remainder of the judgment is not required for the purpose of this report.]

Appeal accepted.

No. 43.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.

SHAHBAZ KHAN AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

FAZAL DIN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 685 of 1909.

Pre-emption—in respect of land sold subject to mortgage—mortgage-money left with vendee to effect redemption—if vendee has accordingly paid off the mortgage before suit, pre-emptor cannot claim to pre-empt only in respect of the equity of redemption.

Where a sale of land, subject to a mortgage with possession, was effected for Rs. 3,500 and of the purchase-money Rs. 2,000 was left with the vendees to pay off the mortgage, and the vendees accordingly redeemed the mortgage and took possession.

Held, that a person who, after such redemption, sues for pre-emption in respect of that sale cannot claim to get a decree only for the equity of redemption on payment of Rs. 1,500, but that he is bound to recognise the redemption of the mortgage as a valid act of the vendees under the contract of sale and to restore them to the position they occupied before the sale; and that consequently the lower Appellate Court was right in directing the pre-emptor to pay the vendees Rs. 3,500 as a condition precedent to obtaining possession of the land.

39 P. R. 1902 (F. B.) (*Bogha Singh v. Gurmukh Singh*) (1), differentiated.
Further appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi Division, dated the 20th May 1909.

Pestonjee Dada Bhai, for appellants.

Dina Nath and Fazal Ilahi, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—The facts of the case so far as they are material to the decision of the question involved in this appeal are these. One Fazal Din sold his *muqarraridari* rights in 8

13th Jany. 1912.

kanals $12\frac{1}{2}$ marlas of land to certain vendees by a registered deed, dated the 3rd October 1906, for Rs. 3,500. The property sold was already under mortgage with third parties for Rs. 2,000 and the deed of sale recited that the mortgage-money was left with the vendees and that they were at liberty to redeem the mortgage on payment of Rs. 2,000 to the mortgagees. The mortgage was one with possession and had been made by Fazal Din by a registered deed, dated the 26th June 1898, and the period of mortgage as entered in the mortgage-deed was ten years. The language of the deed shews that this period was fixed primarily for the benefit of the mortgagor and that he was not debarred from redeeming the mortgage before the expiry of ten years.

It appears that soon after the sale of October 1906 the vendees from Fazal Din redeemed the mortgage in question by paying Rs. 2,000 to the mortgagees and obtained possession of the land, the mortgagees raising no objection to the redemption taking place before the expiry of the period of 10 years above referred to. Two suits for pre-emption were brought in respect of the sale in question—

(1) by Shahbaz Khan on the 2nd October 1907, and

(2) by Zain-ud-Din, brother of Fazal Din on the 22nd October 1907.

In the first suit Shahbaz Khan alleged, *inter alia*, that the price entered in the sale-deed had not been paid and fixed in good faith; that only Rs. 2,500 had been so paid; and that this sum represented the market value of the land. Zain-ud-Din, the rival pre-emptor, sued to pre-empt only the equity of redemption, alleging that besides the sum of Rs. 2,000 due to the mortgagees only Rs. 1,300 had been paid to the vendor, and that the remaining Rs. 200 was a fictitious item. He asked for a decree in respect of the equity of redemption on payment of Rs. 1,300, or, in the alternative, for a decree for possession of the whole land on payment of Rs. 3,300 or such other sum as the Court might fix. Each rival pre-emptor having been made a defendant in the suit brought by the other, the parties went to trial on various issues raised on the pleadings; and as a result of the findings recorded by him on those issues, the District Judge gave Zain-ud-Din, whose right of pre-emption was held to be superior to that of Shahbaz Khan, a decree for possession of the land on payment of Rs. 3,500 on or before the 5th May 1908. In the event of Zain-ud-Din, not depositing the money within the prescribed period, Shahbaz Khan was to obtain possession of the land on payment of the same amount on or before the 25th May 1908.

From the decree of the District Judge both Zain-ud-Din and Shahbaz Khan preferred separate appeals to the Divisional Court, the former urging, *inter alia*, that he should have been allowed to pre-empt only the equity of redemption and to obtain a decree on payment of Rs. 1,300 or such other sum as had been paid by the vendees to Fazal Din, subject to the mortgage for Rs. 2,000 ; in other words, that he should not have been directed to pay the mortgage-money Rs. 2,000 to the vendees, who had redeemed the mortgage on payment of that amount to the mortgages, in addition to the amount paid by vendees to the vendor. The Divisional Judge held that the sale was for Rs. 3,500 and not for Rs. 1,500, and that as before the institution of Zain-ud-Din's suit the vendees had paid Rs. 2,000 to the mortgagees and redeemed the mortgage, Zain-ud-Din was bound to pay the full amount Rs. 3,500 to the vendees provided that the price mentioned in the sale-deed had been paid and fixed in good faith. The learned Judge found that the price was so paid and fixed, and he therefore dismissed Zain-ud-Din's appeal except that he allowed his sons (Zain-ud-Din having meanwhile died) till the 20th June 1909 to deposit the sum of Rs. 3,500 in Court, failing which the suit was to stand dismissed.

From the decree of the Divisional Judge Zain-ud-Din's sons have appealed to this Court ; and the sole question for decision in the appeal is whether the Lower Appellate Court has erred in law in declining to grant to the appellants a decree for equity of redemption on payment Rs. 1,500, subject to the mortgage for Rs. 2,000 in the hands of the vendees, who have already redeemed the mortgage and obtained possession of the land from the mortgagees. After hearing Mr. Pestonjee Dadabhai for the appellants we have no hesitation in holding that the view taken by Lower Appellate Court is correct. Admittedly the mortgage in question was redeemed by the vendees long before Zain-ud-Din brought his suit ; and in our opinion, on the proper construction of the mortgage-deed, dated the 26th June 1898, the vendees, as representatives in interest of the mortgagor, Fazal Din, were not debarred from redeeming the mortgage before the expiry of the period of 10 years specified in the mortgage-deed. That period was, it seems to us, fixed for the benefit of the mortgagor, and the mortgagees by having accepted the mortgage money from the vendees before the term of 10 years had expired, unmistakably shewed that the real intention of the parties to the mortgage-deed was, that the mortgagor had a right to redeem whenever he pleased. That being so, the vendees were well within their rights in

deeming the mortgage soon after the sale took place in their favour, and they effected redemption of the mortgage in pursuance of the power given to them by the sale deed of 3rd October 1906. Further, it is clear that the consideration for the sale was Rs. 3,500 and not Rs. 1,500; the stamp-paper on which the sale-deed was inscribed is of the value of Rs. 35, thus showing that what was sold was not merely the equity of redemption valued at Rs. 1,500 but the whole property in dispute, subject to the mortgagee's lien amounting to Rs. 2,000 which the vendees were empowered to pay off at any time they pleased after the date of sale. They exercised that power in pursuance of the contract of sale before Zain-ud-Din's suit was instituted; the mortgage for Rs. 2,000 ceased to exist as soon as it was redeemed by them; and they became entitled to receive from the pre-emptor the whole amount of the purchase money, Rs. 3,500, entered in the sale-deed, provided of course that it was proved to have been paid and fixed in good faith. On a suit for pre-emption being successful as against a vender with a defeasible title, the pre-emptor takes over the entire bargain and the vendee drops out of it altogether, the *status quo ante* being completely restored, so that the vendee's connection with the land is wholly severed. If in pursuance of a stipulation in the contract of sale the vendee has exercised the power of redemption in respect of a pre-existing mortgage by paying the mortgage debt to the mortgagee, he must be held to have exercised that power on behalf and for the benefit of the pre-emptor who subsequently brings a suit for pre-emption and the latter cannot be allowed to claim only the equity of redemption which *ex hypothesi* is no longer in existence, on paying to the vendee the value thereof and to force him to keep up his connection with the land as mortgagee of the property in place of the prior mortgagee whom he has paid off. Such a situation would be both anomalous and inequitable; and in the majority of cases it would entail undue hardship on the vendee, who is entitled to demand that if a decree for pre-emption is passed against him, he should cease to have anything to do with the land.

In support of his contention that Zain-ud-Din had a right to pre-empt only the equity of redemption on payment of Rs. 1,500 the appellant's counsel relies on *No. 93 P.R. 1902 (Bogha Singh v. Gurmukh Singh)* (1). That decision, however, in no way helps the learned counsel, as all that was held there was

that where a pre-emptor successfully asserts his right of pre-emption in respect of a sale as against a vendee with a defeasible title, he is not bound by an incumbrance created by the latter on the property sold between the date of sale and the date of the suit brought by the pre-emptor. In the present case the vendees did not create any incumbrance on the property sold between the date of sale and the date of Zain-ud-Din's suit; and they have in no way, by any act of their own, dealt with the property to the prejudice of the pre-emptor. The incumbrance on the property had been created by the vendor, Fazl Din, himself long before the date of sale, and one of the terms of the contract of sale between Fazl Din and the vendees was that they were at liberty to clear off the incumbrance by paying Rs. 2,000 to the mortgagees. In paying the said sum to the mortgagees and thus redeeming the mortgage the vendees acted simply in pursuance of the contract of sale; and when Zain-ud-Din asserted his right of pre-emption successfully and obtained a decree from the Court, he was bound to recognize the redemption of the mortgage as a valid act of the vendees under the said contract and to restore them to the position they occupied before the sale was made in their favour. While on the one hand they could not as against Zain-ud-Din in any way benefit by the sale, on the other hand they could not be prejudiced in their relation to the land by reason of anything done by them in terms of the contract of sale before the suit for pre-emption was brought against them. If, of course, the vendees had not paid the mortgage money to the mortgagees and redeemed the mortgage before Zain-ud-Din's suit was instituted, the latter would have been entitled to get a decree for pre-emption on payment of Rs. 1,500 only. That, however, is not the case here, and we are quite clear that the appellants, as heirs of Zain-ud-Din, were rightly directed by the Lower Appellate Court to pay Rs. 3,500 to the vendees as a condition precedent to their obtaining possession of the land. This they failed to do within the prescribed period and their suit stands dismissed.

As a last resort, their counsel has asked us to allow them an extension of time for payment of Rs. 3,500 into Court, but we can see no reason whatever for acceding to this request. No such prayer is made in the grounds of appeal; and even if it had been made, we should not have granted it, as the Divisional Judge showed them great indulgence in extending the time for payment of the amount into Court up to 20th June 1909, and

yet they failed to comply with the decree. We cannot now after the lapse of over two years and a half from that date grant them another extension of time, and we decline to accede to the request preferred by their counsel.

The appeal fails and is dismissed with costs throughout.

Appeal dismissed.

No. 44.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.

NABA AND OTHERS—(PLAINTIFFS)—APPELLANTS,

Versus

PIARA MAL AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 713 of 1909.

Punjab Pre-emption Act, II of 1905, section 13 (1), fifthly—houses in same blind alley—"common entrance from street."

Where the pre-emptor's house and the house in dispute both opened into a blind alley (*kucha sarbasta*) and into the same alley opened two other houses, and it was not shewn that the alley was the private property of the owners of the four houses or that none except these persons had free access to it or a right of way over it—

Held, that the entrance to the alley was not "a common entrance from the street" of the pre-emptor and the vendor within the meaning of section 13 (1) *fifthly* of the Punjab Pre-emption Act.

Further appeal from the order of T. P. Ellis, Esquire, C.S., Divisional Judge, Multan Division, dated the 17th April 1909.

Shadi Lal, for appellants.

Oertel and M. N. Makerji, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal has arisen out of a suit for **15th Jan. 1912.** pre-emption brought by Sobha Ram, father of the appellants, who has since died, against the defendants-respondents in respect of a house situate in *Mohalla Hamam* in the city of Multan. The original plaintiff based his suit on the ground that he had a common entrance from the street with the vendor Allah Basaya, and that therefore under section 13 (1) *fifthly* of the Punjab Pre-emption Act, he had a superior right of pre-

emption as against the vendee, Piara Mal, whose house adjoined the house in dispute on the back and opened into another street. The District Judge held that the plaintiff had a common entrance from the street with the vendor as alleged by him and therefore decreed his claim; but on appeal the Divisional Judge came to the contrary conclusion and dismissed their suit. The plaintiff, Sobha Ram, having died, his sons have been brought on the record as his legal representatives; and on their behalf it has been contended by Mr. Shadi Lal that their claim falls within the purview of section 13 (1) *fifthly* of the Pre-emption Act, inasmuch as the house in dispute and the house of the appellants by virtue of which they claim pre-emption, have a common entrance from the street, whereas the vendee has not such a common entrance. In the judgment of the District Judge is given a rough sketch of the locality showing the relative positions of the appellants' house, the house of the vendee and the house in dispute. The vendee's house is at the back of both the appellants' house and the house in suit, and it opens into a blind alley to the north of the appellants' house. The house in dispute and the appellants' house both open into a blind alley (*kucha sarbasta*) of irregular shape and comparatively small dimensions, and into this same alley open two other houses, one of which belongs to a Hindu and the other to a Muhammadan. The appellants' contention is that this blind alley is the private property of the four houses to which it gives access; that it is not a "street" within the meaning of section 13 (1) *fifthly* of the Pre-emption Act, and that it is a common entrance or passage from the public street to the east as regards all the four houses, including the appellants' house and the house in dispute, which open into it. The District Judge inspected the spot and found that the alley was some 3 feet wide at the entrance, and that it constituted the sole passage to three out of the four houses above referred to, two of which belong to Muhammadans and two to Hindus. He held that to all intents and purposes this alley belonged to the owners of those four houses; that it could not be considered a public street; and that its mouth was a common entrance from the Municipal street as regards all the four houses opening into it, including the pre-emptor's house and the house in dispute. The Divisional Judge has not agreed in this view, and after hearing Mr. Shadi Lal, we think that the decision of the Divisional Judge is correct.

The Punjab Pre-emption Act does not contain a definition of "street," but we may take it that the legislature intended

to use the word "street" in section 13 in very much the same sense in which it is used in the Punjab Municipal Act, which defines it as including "any way, road, lane, square, court, "alley, passage or open space, whether a thoroughfare or not, "over which the public have a right of way." The plaintiff produced only two witnesses, Hema and Pir Mal, and their evidence is clearly insufficient to prove that the blind alley in question is the private property of the owners of the four houses which open into it. There is no arch or door at the mouth of the alley where it opens into the public street to the east, and its irregular shape, as indicated in the plan on the record, rather shews that Jandu Ram's house, which is the first to open into it, has, to some extent, encroached on its original site. Each of the four houses which open into it has a separate door, and there is nothing to shew that none except the owners of those houses have a free access to or a right of way over it. Further, the four houses in question are not shewn to have at one time constituted one building with the opening passage of the alley as its entrance and to have been subsequently subdivided into separate dwelling houses with separate owners. The privacy of the four houses is not to any large extent ensured by the blind alley in question, as it ordinarily would be by the existence of a common entrance from the street; and it is certainly not proved that the owners of the four houses have ever exercised or can exercise any rights of joint property in respect of this alley. The facts that its mouth is only some 3 feet wide, and that the number of houses approached through it is rather small, are not of themselves sufficient to constitute it into "a common entrance from the street" within the meaning of section 13 (1) *fifthly* of the Punjab Pre-emption Act as regards the appellants' house and the house in dispute.

For the above reasons, we hold that the appellants have failed to prove that they have a superior right of pre-emption in respect of the house in question as against the vendee; and we accordingly maintain the decree of the Lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

No. 45.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

DASAUNDHI AND HARNAM SINGH—(PLAINTIFFS)—
APPELLANTS

Versus

CHANDA SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 32 of 1910.

Custom—succession—by adopted son to property in his natural family in preference to collaterals—Hindu Jats—Ludhiana Tahsil—Riwaj-i-am.

Held, that the ordinary rule among agricultural tribes in the Punjab is that a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father.

Held also, that a corollary to this general rule is, that among many tribes it is recognised that the appointed heir and his lineal descendants have no right to succeed to any share in the family of the natural father as against other sons (and their descendants) of the latter.

100 P. R. 1906 (*Mukh Ram v. Not Ram*) (1) referred to.

Held further, that, generally speaking, the tribes recognise a preferential right on the part of the appointed heir to succeed to the property of his natural father, where the only other claimant is the collateral heir of the latter.

Held consequently, that among Hindu Jats of Man got of Mauza Nangal, tahsil and district Ludhiana, the sons of an appointed heir were entitled to succeed to the ancestral property left by their father's natural father in preference to collaterals, notwithstanding the entry in the customary law of the Ludhiana District to the contrary, the entry not being supported by a single existence.

Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge, Ludhiana Division, at Ferozepore, dated the 19th of November, 1909.

Lajpat Rai, for appellants.

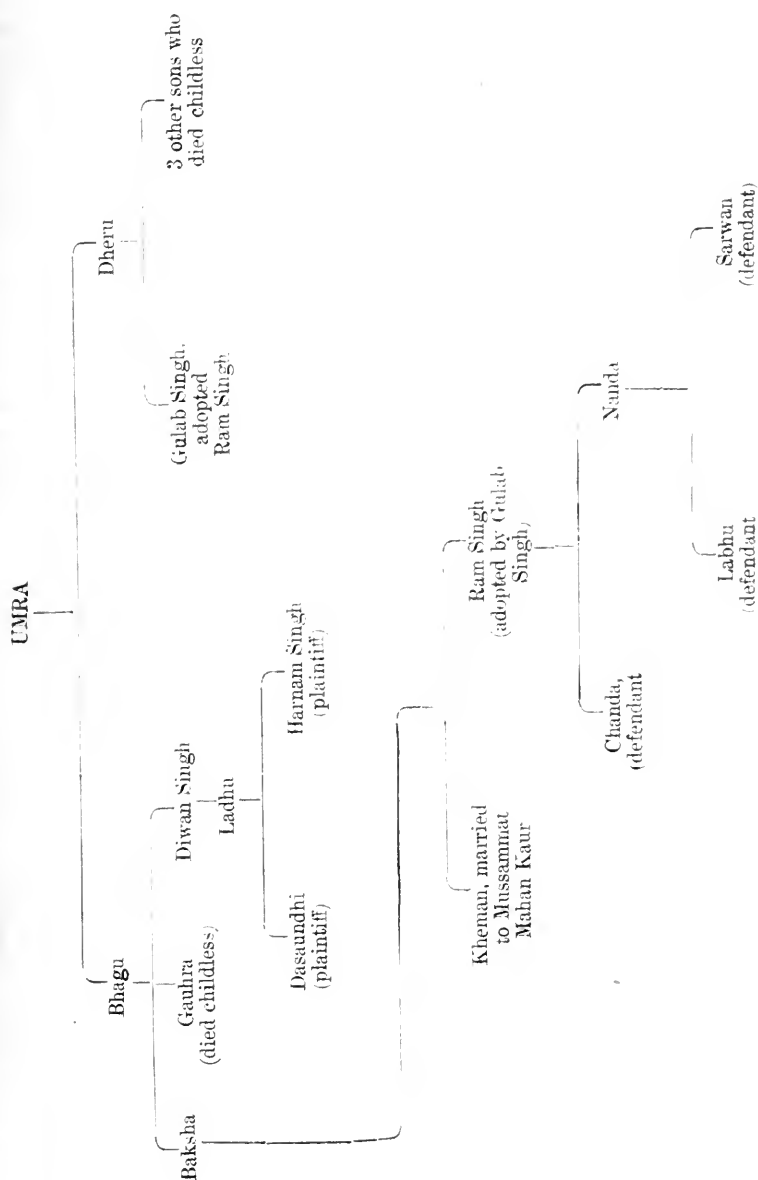
Sukh Dial and Durga Das, for respondents.

The judgment of the Court was delivered by—

17th Jan. 1912.

RATTIGAN, J.—The parties are Hindu Jats, of the Man got of mauza Nangal, tahsil and district Ludhiana, and the following pedigree-table (which is admittedly correct) explains

rather more satisfactorily the facts than that given in the judgment of the Additional District Judge :—



It is admitted that Ram Singh, who was adopted by Gulab Singh, (1) succeeded to the estate of his adopted father, Gulab Singh, and (2) did not inherit any part of the estate of his natural father, Bakhsha, when the latter died. On the occasion of Bakhsha's death, the whole of his estate descended to Ram Singh's natural brother, Kheman, and upon the death of Kheman (who left no lineal descendants), the said estate was enjoyed for her life by his widow, Mussammatt Mahan Kaur. She has now died, and mutation of names in respect of Kheman's estate was effected by the Revenue authorities in favour of the descendants of Ram Singh. Plaintiffs who are the descendants of Diwan Singh, the brother of Bakhsha, claim to be entitled to the property on the ground that as Ram Singh was adopted by Gulab Singh and succeeded to the latter's property, his descendants have no right to any property which originally descended from his natural father. The simple question, therefore, that arises in this case is (as stated by the Divisional Judge) "whether, where a person has been adopted, and has in the presence of a real brother not inherited in his natural father's family, he or his heirs can succeed in the natural father's family in preference to collaterals not descended from the natural father."

It was admitted in the lower courts that the so-called adoption of Ram Singh by Gulab Singh was in fact the ordinary customary appointment of an heir as recognised among agricultural tribes in this Province, and though Mr. Lajpat Rai attempted to show that it was in reality something different, we see no reason to doubt that the admissions made in the courts below were correct, and it is upon this assumption that we proceed to deal with the question before us.

In view of the authorities we must take it as established that the general rule accepted by the agricultural tribes in the Punjab is, that a person who is appointed as an heir to a third person does not thereby lose his right to succeed to the property of his natural father (para. 48 of the Digest of Customary Law and the cases there cited). A corollary to this general rule is that among many tribes it is recognised that the appointed heir and his lineal descendants have no right to succeed to any share in the family of the natural father as against the latter's other sons and their descendants (see, *e.g.* No. 100 *P. R.* 1906 (*Mukh Ram v. Not Ram*) (1)).

But, speaking generally, we have no hesitation in saying that the agricultural tribes of this Province recognise a preferential right on the part of the appointed heir to succeed to the property of his natural father when the only other claimant is the collateral heir of the latter.

The evidence in the present case, so far as it goes, supports the above conclusions. There is, no doubt, *per contra* the very general statement in the Customary Law of the Ludhiana District (p. 70), but the rule therein laid down is opposed to the rule as generally observed in the Province and not a single instance is given in support of it. That this general rule is not correct for the whole of the Ludhiana District is apparent from the fact that, according to the *Rivaj-i-am* of the Pakhowal Pargana, an adopted son succeeds to his natural father's estate in the absence of brothers and their descendants.

Plaintiffs have produced evidence to show that in certain instances an adopted son has not succeeded, in this or a neighbouring village, to a share in his natural father's estate, but in every such instance the persons who have succeeded to the latter's property have been either the natural brothers of the adopted person, or their lineal heirs. On the other hand, defendants have adduced instances to show that in certain cases the adopted person has succeeded to a share in his natural father's property, even in the presence of natural brothers.

In our opinion, formed after careful consideration of the evidence and the arguments of counsel, the judgment of the learned Divisional Judge is right. It may well be that the right of an adopted son to succeed in the family of his natural father is not universally conceded by custom among agricultural tribes in cases where the natural father has left lineal descendants, though even in such cases it will be found that among many tribes the right of the adopted son is recognised. But be that as it may, we have no doubt that the ordinary rule prevailing among the tribes in the Punjab is that the right of the adopted son and his lineal descendants to succeed to the property of his natural father is preferential to the right of the latter's collaterals. In the present case we can find nothing on the record to justify us in departing from this general rule and we therefore dismiss this appeal with costs.

Appeal dismissed.

No. 46.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

TEK CHAND—(PLAINTIFF)—APPELLANT,
Versus
MUSSAMMAT GOPAL DEVI AND OTHERS—(DEFENDANTS)
—RESPONDENTS.

Civil Appeal No. 1139 of 1909.

Hindu Law—adoption of second son in lifetime of first adopted son—estoppel—in regard to validity of second adoption by reason of allowing second adopted son to share in inheritance from adoptive father—Indian Evidence Act, I of 1872, section 115—alienation by widow for future necessities—consent to such alienation by nearest collaterals—status of remote collateral to maintain suit for declaration under section 43, Specific Relief Act, I of 1877.

Held, that under Hindu Law the adoption of a second son during the lifetime of a first adopted son is invalid.

Held also, that the fact that the first adopted son has allowed the second adopted son to share the inheritance of the adoptive father with him does not estop the former or his representative under section 115 of the Evidence Act from denying the validity of the adoption of the latter.

Meaning of "thing" in section 115, explained.

Sarat Chunder Dey v. Gopal Chunder Laha (1), *Eranjoli Vishnu v. Eranjoli Krishnan* (2) and *Carr v. London and N.-W. Rail. Coy.* (3), referred to.

Held also, that a widow governed by Hindu Law is not empowered to sell immovable property inherited from her husband in order that she may keep by her a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come and that the same principle applies to the need of future maintenance.

Ganap v. Subbi (4) and 11 P. R. 1885 (*Nihal Singh v. Mussammat Rajon*) (5), referred to.

Held further, that when the nearest collaterals (with male issue) had given a *bonâ fide* consent to such an alienation by a widow, the more distant collaterals have no *status* to maintain a suit for a declaration under section 42 of the Specific Relief Act and are moreover under *Mitakshara* law bound by the consent of the former.

81 P. R. 1900 (*Mussammat Fateh Bibi v. Allah Bakhsh*) (6), 7 P. R. 1905 (*Labhu v. Mussammat Nihali*) (7), 97 P. R. 1906 (*Buta v. Khuda Bakhsh*) (8), 37 P. R. 1907 (*Deri Dial v. Utam Deri*) (9), *Raj Lakhee Dabea v. Gokool Chunder Chowdhry* (10) and *Bajrangi Singh v. Manokarkika* (11).

(1) (1892) L. R. 19 I. A. 203 (P. C.). (6) 84 P. R. 1900.

(2) (1883) I. L. R. 7 Mad. 3 (F. B.). (7) 7 P. R. 1905.

(3) (1875) L. R. 10 C. P. 307. (8) 97 P. R. 1906.

(4) (1908) I. L. R. 32 Bom. 577. (9) 37 P. R. 1907.

(5) 11 P. R. 1885. (10) (1869) 13 Moo. I. A. 209, 223 (P. C.).

(11) (1907) I. L. R. 30 All. 1 (P. C.).

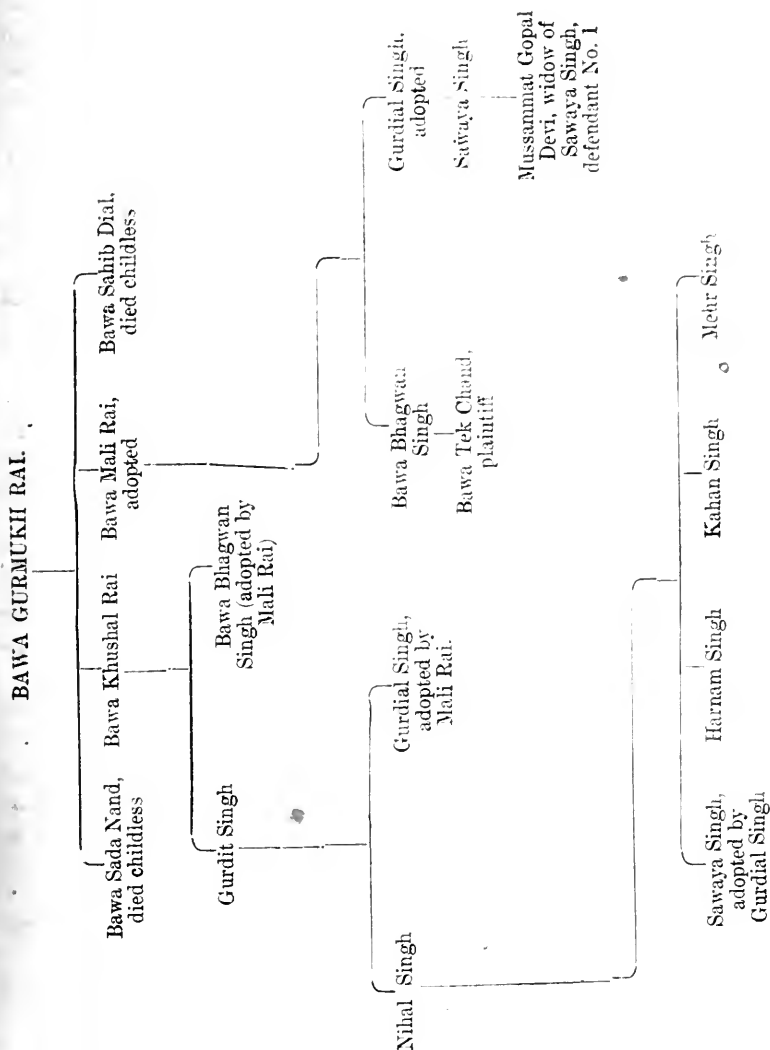
*Further appeal from the order of W. A. LeRossignol, Esquire,
Divisional Judge, Amritsar Division, dated the 28th July 1909.*

Sukh Dial and Tirath Ram, for appellant.

Dwarka Das, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—The pedigree table which includes the plain- 19th Jan. 1912.
tiff and defendant No. 1 is as follows:—



It will be seen from it that Bawa Gurmukh Rai had four sons, two of whom died childless, while we are concerned in this case with the descendants, adopted and natural of the other two sons, whose names are Khushal Rai and Mali Rai—Mali Rai first adopted his nephew Bhagwan Singh, and then, Bhagwan Singh being still alive, he adopted Bhagwan Singh's nephew, Gurdial Singh. Bhagwan Singh's son is the plaintiff Tek Chand. But Gurdial Singh, who apparently had no sons, adopted Sawaya Singh, his own nephew. After the death of Mali Rai, Bhagwan Singh and Gurdial Singh divided his property equally as the result of a law suit between them in 1860. Sawaya Singh succeeded to the property of Gurdial Singh, and on Sawaya Singh's death his widow Gopal Devi, defendant No. 1, took that estate, and, on 2nd November 1905, sold a house which formed part of it to defendants 3 to 10 for Rs. 2,500. Plaintiff sues for a declaration against this sale. He claims to do so as being the nearest reversioner. This allegation is denied by the defendants, who also plead that the sale was for necessary purposes, and that the plaintiff acquiesced in it. The first Court held that according to Hindu Law the simultaneous adoption of two sons was invalid.

As a matter of fact the two adoptions by Mali Rai were not simultaneous, and the finding of the Court really was that the adoption of Gurdial Singh was invalid. But the Court went on to hold that inasmuch as Bhagwan Singh and Gurdial Singh in 1860 recognised each the adoption of the other, the defendants, as representing Gurdial Singh, could not now be allowed to raise any objection to the validity of these adoptions. It then went on to hold that plaintiff was not shewn to have acquiesced in, or to have ratified, the sale; and so far the findings are all in favour of the plaintiff. But when the Court came to consider the question of consideration and "necessity," it took the other side. It held that the widow Gopal Devi had acted in a prudent and sensible manner and that the sale was for valuable consideration and legal "necessity" and so the plaintiff's suit was dismissed with costs.

The learned Divisional Judge, when the case came before him on appeal, agreed with the first Court virtually on all points and dismissed the appeal. He held that the second adoption, *i.e.*, the adoption of Gurdial Singh, was void, but that the defendants were estopped from raising the plea, and then, after an exhaustive consideration of the financial aspect of the question, he came to the conclusion that though a widow must

not ordinarily anticipate her needs, yet in the present case the sale was made *bonâ fide* and was an act of good management and was in fact for "necessity."

The plaintiff now comes up to this Court on appeal. There can be no doubt that under Hindu Law the adoption of Gurdial Singh was invalid. We think we may take it that Bhagwan Singh's adoption was first in point of time and Gurdial Singh's adoption later. But even if the two were simultaneous the result is much the same; for if the two were adopted simultaneously, then both the adoptions were invalid and Bhagwan Singh and Gurdial Singh each remained in the eye of the law in his natural family. From this point, however, we part company with the Courts below.

It seems to us that the widow and her alienees have not succeeded in shewing that the alienation was for "necessity" according to the most approved principles laid down in rulings of high authority. It seems that when her husband died she was possessed at least of Rs. 7,000 in cash, equity of redemption of certain jewels mortgaged for Rs. 1,286, and possibly some shops, in addition to the house now in suit. Instead of paying off her husband's debt of Rs. 4,165 to the vendees and some Rs. 200 or Rs. 300 to coolies for work, what she did was to spend Rs. 1,286 in redeeming the ornaments aforesaid, to pay Rs. 1,665 only to the vendees in cash; and to sell them two-fifths of the house in dispute for Rs. 2,500 thus keeping some Rs. 3,000 odd in cash, out of which she seems to have spent some Rs. 300 on repairs of that portion of the house which remained unsold. The reason given for her keeping back this sum of Rs. 3,000 is said to be that she looked forward to the necessity for paying the marriage expenses of her own daughter and was also providing for her own future maintenance. But in our opinion this is just the kind of thing which the rulings aforesaid denounce.* According to the principles laid down by the Courts she ought to have paid the debt of Rs. 4,165 in full out of the cash in hand; and she ought also to have paid off the coolies, as she did, and the Rs. 300 for house repairs, with the result that she would have found herself with some Rs. 2,190 in hand, the jewels aforesaid remaining still in pawn. It would then have been open to her to redeem those ornaments if she pleased, or to leave them in pledge. Her daughter is said by one witness to have been at that time two or three years old and by another seven or eight. It is clear that her marriage was not an urgent pressing matter, and as a matter of

*Mayne, page 13, last sentence, *Ganap v. Subbi* (1), cf. 11 P. R. 1885 (*Nihal Singh v. Mussamat Rajon*) (2), a custom case).

fact, though this girl lived for two years afterwards, she was not even betrothed up to the time of her death. No further argument is required to shew that it is not open to a widow governed by Hindu Law to sell immoveable property inherited from her husband in order that she may keep by her a sum of money for the marriage of her child, which marriage is not likely to take place for many years to come; and a similar remark applies to the need for future maintenance.

However, we need not pursue this matter any further, because we are inclined to think that plaintiff's suit and appeal must fail on the ground of want of *locus standi*. As already stated, there is no doubt whatever about the invalidity of the adoption of Gurdial Singh, who therefore remained in the family of Gurdit Singh. Looking at it in this way Sawaya Singh's nearest reversioners are Harnam Singh, Kahan Singh and Mehr Singh; and, of these three, the first two approved the sale and actually signed the deed in token of their approval. Now, although we have said that a widow, according to Hindu Law, is not entitled to anticipate future "necessity," yet we see no reason to suppose that Harnam Singh and Kahan Singh, in consenting to the sale, acted otherwise than in good faith and with due regard to the interests of the family. So far as we can tell from our examination of the facts, the widow's action was prudent and sensible, and the only way in which she was in error was that she misconceived the extent of her own powers. Harnam Singh and Kahan Singh, however, by giving their free consent, cured that defect; and in this way it seems to us that, according to the authorities, Tek Chand, the more distant reversioner, has no *locus standi* in this dispute.

In custom cases 84 P. R. 1900 (*Mussammatt Fateh Bibi v. Allah Bakhsh*) (1), 7 P. R. 1905 (*Labhn v. Mussammatt Nihali*) (2), 97 P. R. 1906 (*Bata v. Khuda Bakhsh*) (3), and 37 P. R. 1907 (*Devi Dial v. Utam Devi*) (4), among other rulings, make this principle clear, and, notwithstanding the conflict of opinion between the High Courts noticed in Chapter XX of Mayne's book already cited, we think that a similar rule applied here. Thus in *Raj Lakhoo Dabeu v. Gokool Chunder Chowdhry* (5), Their Lordships of the Privy Council ruled that the persons whose consent is required are those "likely to be interested in disputing the transaction," and here we have, between the property and plaintiff Harnam Singh and Kahan Singh, who are without denial said to have male issue.

(1) 84 P. R. 1900.

(3) 97 P. R. 1906.

(2) 7 P. R. 1905.

(4) 37 P. R. 1907.

(5) (1869) 13 Moo. I. A. 209, 228 (P. C.).

The chances of Tek Chand's succeeding to the property in suit by inheritance, supposing the adoption of Gurdial Singh is taken as no adoption at all, are very remote and are insufficient to support a suit under section 42, Specific Relief Act. We would also refer to *Bajrangi Singh v. Manokarnika* (1), in which Their Lordships laid down that *bonâ fide* consent by the first set of reversioners bound all the remoter reversioners under Mitakshara law.

The Courts below, as already stated, have held defendants-vendees estopped from pleading that Gurdial Singh's adoption by Mali Rai was invalid; but we are unable to agree that the mutual recognition in 1860 by Bhagwan Singh and Gurdial Singh of each other's adoption does in law operate as an estoppel. As this is a point of some difficulty we must deal with it in some detail.

Bhagwan Singh was first adopted by Mali Rai, and Gurdial Singh was adopted later. There seems no reason to doubt the *factum* of adoption in either case, though as a matter of law the later adoption was invalid. Gurdial Singh after the death of Mali Rai, sued Bhagwan Singh for half of the property of Mali Rai, thus alleging in effect two things:—

(a) that Mali Rai had gone through the ceremony of adopting him;

(b) that such an adoption was valid in law.

Bhagwan Singh was unable to deny (a), and indeed it is not denied now. He admitted Gurdial Singh's claim and the two took Mali Rai's property half and half. The vendees in the present case and their vendor Mussammat Gopal Devi are, it may be conceded, "representatives" of Gurdial Singh within the meaning of section 115, Indian Evidence Act, and therefore, if Gurdial Singh would have been estopped from denying that he was the son of Mali Rai, we think the said vendees and vendor would also be estopped, but, upon the wording of the aforesaid section and on the authorities we have had the advantage of consulting, we are unable to hold that even Gurdial Singh would have been so estopped. In that section the word "thing" is significant. We concede that defendants in the present case would not be permitted to deny the *factum* of Gurdial Singh's adoption; but it is otherwise when we come to the legal question, which is always a mere matter of opinion, of the validity of that adoption. All that can be said is that Gurdial Singh asserted—"I was adopted by Mali Rai as well as you, and I claim half his estate," to which Bhagwan Singh

replied,—“yes, you were adopted in fact, and I think you have “an equal right with me.” The mere view or opinion that upon the later adoption Gurdial Singh was entitled to half the property, is not a “thing” within the meaning of the section. In this connection we adopt the remarks made at pages 764, 780, 781, 5th Edition of Amir Ali and Woodroffe’s book on the Law of Evidence in India, which remarks appear to be based on ample authority; and it thus appears that section 115 aforesaid has no application to such a case as the present.

At first sight the observations of Their Lordships of the Privy Council in *Sarat Chunder Dey v. Gopal Chunder Laha* (1) criticising at page 218 the views of the Madras High Court in *Eranjoli Vishnu v. Eranjoli Krishnan* (2) might seem to be somewhat at variance with the above remarks of ours; but on further examination this is seen not to be so. The matters dealt with in the Madras judgment were in reality largely, if not entirely, matters of fact, and denial of those matters was what section 115 of the Indian Evidence Act, rightly interpreted, prohibited the party from making. The P. C. did not in any way hold that section 115 covered estoppel in connection with representation not only of “things,” that is, facts, but also representations in law: Their Lordships merely expressed the opinion that “a series of acts by which an adoption is professedly made and subsequently recognised” cannot be taken as constituting “a representation in law only and not “of fact.”

Perhaps it is unnecessary to labour the point, but we would like also to refer to the leading case of *Carr v. London and N.-W. Railway Company* (3), in which an attempt was made to lay down comprehensive propositions as to the circumstances and modes in which an estoppel *in pais* may arise. The propositions formulated are four in number, dealing with fraudulent representations, representations without fraud, representations by conduct and representations by omission, respectively, and in all four it is clear that the learned Court intended to limit the *dicta* to matters of fact.

Lastly, we would like to point out that the whole tenor of the section is against the contention that defendants are estopped in this case from denying the validity of the adoption. Gurdial Singh and Bhagwan Singh had equal means of knowledge both of the facts and of the law. On the facts both had

(1) (1892) *L. R.* 19 *I. A.* 203 (*P. C.*). (2) (1883) *I. L. R.* 7 *Mad.* 3 (*F. B.*).
(3) (1875) *L. R.* 10 *C. P.* 307.

full knowledge, and probably neither formulated to himself any very precise propositions of law. There is no reason to suppose that Gurdial Singh, knowing he was not validly adopted, led Bhagwan Singh to believe the adoption to be valid. We are, of course, aware that in order to give rise to an estoppel it is not necessary that the "representation" should be fraudulent, but it is necessary that that representation should be the actual cause of a new belief in the mind of the other party and of his action following on that belief. Now there is no reason to suppose that Bhagwan Singh at first thought Gurdial Singh's adoption invalid but was induced to change his opinion by anything said or done by Gurdial Singh. We must hold, therefore, that plaintiff is not entitled to question the act of Mussammat Gopal Devi, and we dismiss the appeal but without costs. The reason for not giving costs is that the plaintiff may well be excused for his misconception of the law which is shared by both the Courts below.

Cf. Amir Ali, page 757, and Sarat Chunder Dey's case (1), already cited, at page 215 of the report.

Appeal dismissed.

No. 47.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MUSSAMMAT ZENAB—(PLAINTIFF)—APPELLANT,

Versus

SHAH NAWAZ KHAN AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 300 of 1909.

Custom—Alienation—Status of female heir to challenge alienation of ancestral property by her paternal grandfather—validity of transfer of right to contest the alienation by her father's will—Pathans of Miani, Hoshiarpur District.

Held, that it had not been proved that among Pathans of Miani, Hoshiarpur District, a daughter of the son of a male alienor is entitled to object to the alienation by him of ancestral immovable property to a son-in-law, even though the said daughter's father had in a will bequeathed to her the right to raise such objection and to sue for recovery of the said property.

66 P. R. 1897 (F. B.) (*Tota v. Abdullah Khan*) (2), 22 P. R. 1900 (*Mauladad v. Ram Gopal*) (3), 67 P. R. 1909 (*Jawala Sahai v. Ram Singh*) (4) followed.

11 P. R. 1907 (*Sher Singh v. Sidhu*) (5), 19 P. R. 1906 (*Chiragh Bibi v. Hassan*) (6), 72 P. R. 1906 (*Lahori v. Radho*) (7), *Atul Krishna Sircar v. Sanyasi Churn Sircar* (8), *Radha Prasad Mullick v. Rani Mani Dasee* (9), *Padam Lal v. Tek Singh* (10), 93 P. R. 1905 (*Atma Singh v. Kalu*) (11), and 12 P. R. 1901 (*Nawab-ud-din v. Mussammat Kami*) (12), distinguished).

(1) (1892) L. R. 19 I. A. 203.

(2) 66 P. R. 1897 (F. B.).

(3) 22 P. R. 1900.

(4) 67 P. R. 1909.

(5) 11 P. R. 1907.

(6) 19 P. R. 1906.

(7) 72 P. R. 1906.

(8) (1905) I. L. R. 32 Cal. 1051.

(9) (1906) I. L. R. 33 Cal. 947.

(10) (1906) I. L. R. 29 All. 217.

(11) 93 P. R. 1905.

(12) 12 P. R. 1901.

Further appeal from the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur Division, dated the 9th February 1909.

Muhammad Shafi, for appellant.

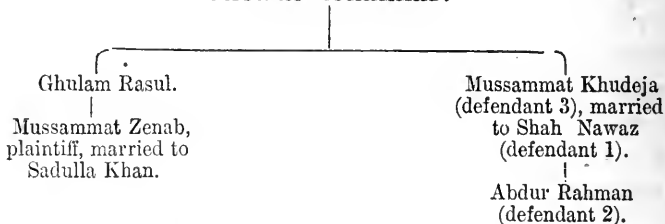
Shadi Lal, for respondents.

The judgment of the Court was delivered by

22nd Jany. 1912.

JOHNSTONE, J.—The pedigree of the parties given below illustrates the dispute between them.

GHULAM MUHAMMAD.



The claim is against defendants for 190 *kanals* 15 *marlas* of land, which plaintiff alleges Ghulam Muhammad, the common ancestor, gave to Shah Nawaz, defendant 1, his son-in-law, in exchange for 159 *kanals* 16 *marlas* of other land. The contentions were that the exchange was not an act of management merely, but was effected for the purpose of unduly benefiting defendant 1, the land in suit being much more valuable than that taken in exchange, and that this act was *ultra vires* of Ghulam Muhammad, a Pathan of Miani in the Hoshiarpur District, and so subject to ordinary Punjab custom. It was also urged that before he died Ghulam Rasul executed a will in favour of his daughter, the plaintiff, in which *inter alia* he bequeathed to her the right to sue for cancellation of the aforesaid exchange.

Defendants resisted the claim, impugning the will and its effectiveness, denying plaintiff's right to sue apart from the will, affirming the good faith of the exchange and adding that it was done to reward Shah Nawaz, defendant 1, for his services to Ghulam Muhammad.

The first Court held the will proved and effective; that plaintiff can sue under section 42, Specific Relief Act, though she is a woman, reliance here being placed on the remarks at page 275 of 72 *P. R.* 1906 (*Lahori v. Radho*) (1) that the exchange was effected to injure Ghulam Rasul and his family, and that there is nothing to shew that the exchange was made to reward defendant 1 for his services, which had been already otherwise sufficiently rewarded.

Plaintiff thus obtained her decree on the condition that she should surrender the land taken in exchange by her grandfather, and the defendants, of course, appealed. The learned Divisional Judge sided with defendants and dismissed plaintiff's suit with costs throughout holding that, while the exchange was intended to benefit defendant 3, the transaction in view of the size of Ghulam Muhammad's estate, was not calculated to cause any appreciable injury to reversioners; that Ghulam Rasul, though he did attempt to revive or keep alive a grievance about the exchange by making mention of it in his will, had virtually acquiesced in it by silence; that, even if Ghulam Rasul had power to contest the exchange, he could not transmit the power to his daughter—C. A. 356 of 1908 of this Court,—and that plaintiff had herself no right to contest an alienation by a former male owner.

Plaintiff has preferred a further appeal here and we have heard the whole case argued by Mr. Shafi for appellants and by Mr. Shadi Lal for respondents. The contentions in the appeal petition are that, both Courts having found the exchange a one-sided one, the Lower Appellate Court should have upheld the order of the First Court; that Ghulam Rasul did not acquiesce in the exchange but intended to dispute it; that both by virtue of the will of Ghulam Rasul and in her own right as heiress plaintiff had the right to have the exchange set aside.

We need give no decision as regards the first and second of these contentions, for we have arrived at the conclusion that the third contention is untenable. It has been frequently held that the right of a reversioner under Punjab custom to dispute an alienation of ancestral property by the male holder cannot be by him transferred to a stranger—see 66 P. R. 1897 (F. B.) (*Tota v. Abdullah Khan*) (1), 22 P. R. 1900 (*Mauladad v. Ram Gopal*) (2), 67 P. R. 1909 (*Jawala Sahai v. Ram Singh*) (3), and *Rattigan's Digest*, para. 67, remarks.

In the ruling of 1909 a previous ruling by a single Judge of this Court was treated as being in conflict with the F. B. decision, namely, 11 P. R. 1907 (*Sher Singh v. Sidhu*) (4) which is quoted by Mr. Shafi in his argument. The line taken is that, the exchange being an *ultra vires* of Ghulam Muhammad, immediately on his death Ghulam Rasul became owner of the land now in suit and that what he dealt with in his will was not a prospective right as a reversioner but an actual vested

(1) 66 P. R. 1897 (F. B.).
(2) 22 P. R. 1900.

(3) 67 P. R. 1909.
(4) 11 P. R. 1907.

title, and that thus the F. B. ruling has no application in such a case as the present one. We are unable to assent to this kind of reasoning. It is admitted by Mr. Shafi, and indeed it is beyond the reach of controversy, that at most the exchange here is avoidable, and by no means in itself a *void* transaction, and therefore it is obvious that at the time of executing his will Ghulam Rasul had nothing more than a right to sue and to contest the exchange. We hold, therefore, that Ghulam Rasul's will, even if executed and otherwise valid, does not operate to transfer to plaintiff the testator's right as a reversioner under Punjab custom. We also lay it down that if Lal Chand, J., in 11 P. R. 1907 (*Sher Singh v. Sidhu*) (1) intended to rule that alienation by a male proprietor, otherwise than for "necessity," is a void act and that on his death the property alienated vests without more ado in his reversioner, then his view is incorrect.

And it is still easier to shew that plaintiff has no power in herself, as son's daughter of Ghulam Muhammad to question any act of his. Mr. Shafi argues here that, in the absence of collaterals near enough to inherit, a daughter becomes full owner by inheritance, and further that, if a gift to a daughter is valid, it makes her a full owner. He also points out that these Pathans are endogamous that they lean towards Muhammadan Law and that their daughters are more favoured than among *Jats*. He admits that there is no direct authority for the proposition that a female of Pathan race even if she is heiress, can control her father's father's dealings with his landed estate, or indeed that in any Punjab tribe a woman heiress can control any male holder's dealings with his land; and in these circumstances his contentions are somewhat startling. He appears to lose sight of the fact that his references to the favoured position of daughters among these Pathans tell rather against his client than in her favour, for after all the exchange was for the benefit of a daughter and the land given was a very minute fraction of the 10,000 *kanals* of land owned by Ghulam Muhammad. But we need not labour this point; for the authorities cited by Mr. Shafi, admittedly not directly in point, seem to us to fall far short of establishing his propositions. Clearly such rulings as *Atul Krishna Sircar v. Sanyasi Churn Sircar* (2), *Radha Prasad Mullick v. Rani Mani Dasee* (3), *Padam Lal v. Tek Singh* (4), and 93 P. R. 1905 (*Atma Singh v. Kalu*) (5) which are cited as shewing that gifts of immovable property to daugh-

(1) 11 P. R. 1907.

(2) (1905) I. L. R. 32 Cal. 1051.

(3) (1906) I. L. R. 33 Cal. 947.

(4) (1906) I. L. R. 29 All. 217.

(5) 93 P. R. 1905.

ters import transfer of full ownership, unless the documents indicate the contrary, are quite beside the mark, for here there is no gift or bequest of the land to plaintiff.

Then in 19 *P. R.* 1906 (*Chiragh Bibi v. Hassan*) (1) and 72 *P. R.* 1906 (*Lahori v. Radho*) (2), the alienations which females were allowed to impugn were by females with life interest only and this seems to us to make all the difference, a female heir may well be allowed to prevent a predecessor who has only a life-interest from making away with the property without "necessity," but it is a long step from this to the position that because she is heiress, she can control the acts of a male predecessor. In this connection we do not think that such rulings as those in which a daughter is said in certain circumstances and in certain tribes to come within the category of "*aulad*" are sufficient authority, for according to her the peculiar rights of control allowed by Punjab custom to male agnates. The origin of those rights is to be found in the desire of Punjab tribes to keep ancestral property in the hands of the agnatic group whose common ancestor acquired the property, and it is always the male agnates who have been found to have these rights. Lastly, such a case as 12 *P. R.* 1901 (*Nawab-ul-din v. Mussammatt Kami*) (3) cited by Mr. Shafi, does not seem to us to help him much. There, upon the death *pendente lite* of a reversioner plaintiff who had sued to set aside an alienation by a previous male holder, his heir, a female, was allowed to prosecute the suit in his stead, but in our opinion it does not follow from this, even if the decision is a sound one, a point on which we offer no opinion, that she would have been entitled to institute such a suit herself, if her predecessor in interest had not instituted one at all.

We hold then, that it has not been shewn that among these Pathans of Miani in the Hoshiarpur District, a daughter of the son of a male alienor is entitled to object to the alienation by him of ancestral immovable property to a son-in-law even though the said daughter's father has in a will bequeathed to her the right to raise such objection and to sue for recovery of the said property. We therefore dismiss this appeal with costs.

Appeal dismissed.

(1) 19 *P. R.* 1906.

(2) 72 *P. R.* 1906.

(3) 12 *P. R.* 1901.

No. 48.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

FATEH CHAND AND OTHERS—(DEFENDANTS)—
APPELLANTS,

Versus

KIRPA SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 5 of 1910.

Pre-emption—acquiescence in sale by pre-emptor—waiver.

Where two plaintiffs-pre-emptors were found to have been present and helped in the sale negotiations and one of them assisted in demarcating the land sold out of a large field and thus by their conduct actively induced in the vendees' mind the belief that they were perfectly agreeable to the purchase by the vendees and did not intend to enforce their rights—

Held, that the conduct of the plaintiffs amounted to waiver and that their suit must accordingly be rejected.

7 P. R. 1876 (*Rullia Mall v. Dulo Mal*) (1), and *Bhairon Singh v. Lalman*) (2), referred to.

37 P. R. 1908 (*Fazal Dad Khan v. Sawan Singh*) (3), 99 P. R. 1910 (*Roshan Din v. Khuda Bakhsh*) (4), 100 P. R. 1885 (*Shah Bodhraj v. Sundar Singh*) (5), 78 P. R. 1881 (*Mula v. Nihal Chand*) (6), and *Ram Kishen v. Fakir Ali Shah*) (7), distinguished.

Further appeal from the order of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated the 17th November 1909.

Shadi Lal and Umar Bakhsh, for appellants.

Tek Chand, for respondents.

The judgment of the Court was delivered by

23rd Jan'y. 1912.

JOHNSTONE, J.—In this case the facts are very simple and are to be found detailed in the judgment of the Subordinate Judge. The suit was one for pre-emption and the only question now remaining for decision is whether the plaintiffs waived their rights or not. The Courts below are agreed as to the facts. The first court remarks: "I find, therefore, the evidence of defendant to be reliable. Plaintiffs have taken active part in the completion of the contract of sale and thus have waived their right. The long delay in the institution of this suit lends colour to the fact that at first the plaintiffs were willing in the sale but now have been set up by some unpleasant

(1) 7 P. R. 1876.

(2) (1884) I. L. R. 7 All. 23.

(3) 37 P. R. 1908.

(4) 99 P. R. 1910.

(5) 100 P. R. 1885.

(6) 78 P. R. 1881.

(7) 185 P. L. R. 1905.

"incidents" (*sic*). The Lower Appellate Court, when it comes to this part of the case says: "I therefore accept the finding of the Lower Court that the plaintiffs were present when the price was fixed and I also agree that they took some part in fixing the price. That is to say, I think it is proved that they took part in the discussion as to the price though I do not think it is shewn that they did anything else to bring about the sale. It appears also that Kirpa Singh helped to measure the land which was sold."

Having agreed as to the facts the Courts part company when they come to draw inferences. The first Court says that it considers that plaintiffs waived their rights, while the second Court says that the degree of acquiescence proved falls far short of what is required and it adds; "I cannot hold that a man who, with half a dozen others, takes part in a discussion as to the price of land to be sold, even though the ultimate object of the discussion is to bring the parties to terms, has by so doing, by the unpremeditated act of a single afternoon, waived his right to claim pre-emption."

The defendants-vendees come up here on further appeal on this point, and we think that this appeal must succeed. Mr. Tek Chand on behalf of respondents raises, as he is entitled to do, the question of fact anew. We have carefully examined the evidence of defendants' witnesses who are five in number. The respondents have against them the concurrent findings of the two Courts below, which cannot be set aside unless shewn to be manifestly incorrect. Far from thinking that they are manifestly incorrect, we are inclined to believe implicitly in the appellant's assertion that the plaintiffs were both present and helped in the sale-negotiations, and that one of the plaintiffs was not only present when the land sold was being demarcated out of a large field of which it was a part, but that he actively assisted in the measurement work.

A large number of rulings have been quoted before us, but very few of them are in point. In such cases as these the decision depends upon the circumstances of the particular case, and previous rulings are not generally of much assistance because circumstances vary very largely. The case which is almost exactly in point of all those quoted to us is civil appeal 674 of 1909 where the plaintiff was proved to have taken an active part in the negotiation for sale, to have appeared at mutation and made no objection, and to have sued at the eleventh hour. In the present case also the suit was brought very late, in fact on the very last possible day. There it was

held that waiver was proved. Two other rulings relied upon by Mr. Shadi Lal for the appellants are 7 *P. R.* 1876 (*Rullia Mall v. Dulo Mal*) (1), and *Bhairon Singh v. Lalman* (2), but we do not lay much stress upon these, because both of them, and certainly the latter, appear to us probably to go too far.

On the other side Mr. Tek Chand relies first of all, upon 37 *P. R.* 1908 (*Fazal Dad Khan v. Sawan Singh*) (3), and 99 *P. R.* 1910 (*Roshan Din v. Khuda Bakhsh*) (4), but we cannot say that they help him much. In both of them the point was that the plaintiff, who was already mortgagee of the land in suit, either accepted his money without warning the vendee of his intention to bring a suit, or himself brought a suit for his mortgage money. It seems to us obvious that the fact that in those cases plaintiff was not held to have waived his rights can be no guide for us in the present case. Then Mr. Tek Chand cited several rulings in which it was held that a mere refusal of an oral offer just before sale was no waiver. With those rulings we have no quarrel. It is quite correct to say that, at a time when the law required a written notice to be served on pre-emptors, a mere verbal offer to them followed by refusal was of no account.

Mr. Tek Chand's next ruling, 100 *P. R.* 1885 (*Shah Bodhraj v. Sunder Singh*) (5), is to the effect that a petition-writer, who actually wrote a rough draft of the deed of sale for the parties, is not precluded from suing for pre-emption thereafter. This ruling is on a par with those regarding oral offers. The petition-writer in that case had no duty imposed upon him by law to proclaim his intentions, the law allowing time to think over what he would do. The important point in the present case is this that the plaintiffs by their conduct actively brought about in the vendees' mind the belief that the plaintiffs were perfectly agreeable to the purchase by the vendees and did not intend to enforce their rights; and this differentiates the present case from all those quoted by Mr. Tek Chand.

Lastly the two rulings, 78 *P. R.* 1881 (*Mula v. Nihal Chand*) (6), and *Ram Kishen v. Fakir Ali Shah* (7), quoted by Mr. Tek Chand seem to us not to establish that gentleman's contention. There all that could be said against the plaintiff was that, though he was present at the auction sale of the

(1) 7 *P. R.* 1876.(2) (1884) *I. L. R.* 7 *All.* 23.(3) 37 *P. R.* 1908.(4) 99 *P. R.* 1910.(5) 100 *P. R.* 1885.(6) 78 *P. R.* 1881.(7) 185 *P. L. R.* 1905.

property, he refrained from bidding for it. No argument is required to shew that a case like that is in no way parallel to the present case.

For these reasons we are satisfied that in this case the plaintiffs waived their rights, and we therefore accept the appeal and dismiss the plaintiffs' suit with costs.

Appeal accepted.

No. 49.

Before Hon. Mr. Justice Chevis.

JIWAN AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

DIT AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1126 of 1910.

Custom—Succession—by descendants of adopted son in natural family—Bajwa Jats—Pasrur Tahsil—Sialkot District—Riwaj-i-am.

Held, that among Bajwa Jats, Pasrur Tahsil, Sialkot District, the descendants of an adopted son succeed to the ancestral property left by their father's natural brother in preference to collaterals.

68 P. R. 1898 (*Rukan Din v. Mussammat Mariam*) (1), 59 P. R. 1906 (*Ghela v. Haider*) (2), 100 P. R. 1906 (*Mukh Ram v. Not Ram*) (3), and 37 P. R. 1910 (*Jhanda Singh v. Kesar Singh*) (4), referred to.

Further appeal from the decree of Khan Bahadur Khan Abdul Ghafur Khan, Khan of Zaida, Divisional Judge, Sialkot Division, dated the 23rd of August 1910.

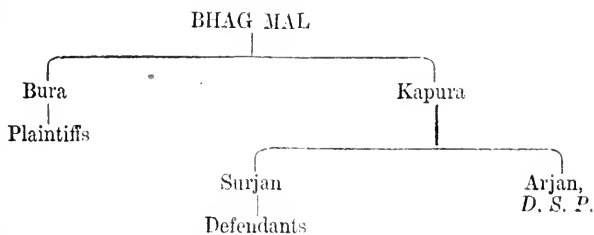
Dharam Chand, for appellants.

Obedullah, for respondents.

The judgment of the learned Judge was as follows:—

CHEVIS, J.—The geneological tree is—

23rd Jany. 1912.



The plaintiffs are descendants of Bura, defendants are descendants of Surjan, who was adopted by his maternal uncle Asa.

(1) 68 P. R. 1898.
(2) 59 P. R. 1906.

(3) 100 P. R. 1906.
(4) 37 P. R. 1910.

The plaintiffs sue for the land in suit, which comprises the whole of the estate left by Kapura, on the ground that Arjan has died sonless. According to plaintiffs, Surjan's descendants have lost all right by reason of Surjan's adoption.

The First Court held that by adoption Surjan had not lost his rights and dismissed the suit. The learned Divisional Judge on appeal held that by adoption Surjan lost his right to inherit in his natural family, and so Surjan's descendants could not inherit Arjan's share of the land, but that Surjan had never given up his own share of the land and so his descendants could not be ousted from that share, so the Divisional Judge decreed the claim to the extent of one-half.

Both sides appeal to this Court. This judgment will cover both appeals.

For the plaintiffs a preliminary objection is raised as to certain representatives of deceased parties not having been brought on to the record in time. But granting that there has been a default, it is one which is common to both sides.

First as regards Surjan's share of the land. It is admitted by plaintiff's counsel that Kapura had died before Surjan's adoption, so Surjan had received half of the land in suit by inheritance from his father even before his adoption, and plaintiff's counsel admits that he is unaware of any ruling in support of the idea that a man should lose by adoption property to which he has already succeeded.

Next as regards Arjan's share of the land. It is admitted before me that Surjan's adoption was only a customary one, and not a regular adoption under Hindu Law.

The Divisional Judge has confused the question of the right of an adopted son to succeed collaterally in his natural family with the question of his right to succeed collaterally in his adoptive family; with the latter question we have nothing to do.

The parties are Bajwa Jats of the Pasmr *Tahsil* of the Sialkot District. The general presumption is that a person adopted in the customary manner of the Punjab as an heir does not thereby ordinarily lose his rights to succeed to property in his natural family, *at least as against collaterals*, see Rattigan's Digest of Customary Law, Article 48. Though in some cases he loses his right to a share in the estate of his natural father, if he has brothers.

The *Riwaj-i-am* of the Sialkot District is to the same effect. In answer 74, it is laid down that if an adopted son is the only

son of his natural father he can succeed to the property of his natural father and also to the property of the collaterals of his natural father, but if he is not the only son of his natural father, he cannot succeed even to a share of his natural father's. This clearly points to the fact that when a man is adopted into another family his rights of succession in his natural family are the same as before so far as collaterals are concerned, though he takes a second place so far as his own brothers are concerned.

The old *Riwaj-i-am* of 1865 simply recites that an adopted son loses his right to inherit as son from his natural father unless he is the only son. This agrees with the later *Riwaj-i-am* so far as it goes.

So too in 68 P. R. 1898 (*Rukan Din v. Mussammat Mariam*) (1), it was held that an adopted son and his descendants were entitled to succeed in the natural family of the adopted son. The case seems very like the present. One Bhana had three sons, Ismail, Khalil and Jamal, of whom the last was adopted by Bhana's uncle Isa. Ismail and Khalil died sonless and on the death of Khalil's widow, Jamal's descendants were held to be entitled to succeed to the exclusion of the descendants of Wazir, another uncle of Bhana. Had Jamal been reckoned merely as the son of Isa, his descendants would have had to share equally with the descendants of Wazir.

The question is decided in the same way in 59 P. R. 1906 (*Ghela v. Haider*) (2), where the learned Chief Judge remarks that "the reasons that would induce an adopted son to give up his rights in his natural family against his own brothers do not apply, or at all events not with the same force where it is a question of succeeding collaterally." If further authority were needed reference might be made to 37 P. R. 1910 (*Jhanda Singh v. Kesar Singh*) (3).

For respondents 100 P. R. 1906 (*Mukh Ram v. Not Ram*) (4) is quoted, but this is merely an instance of an adopted son not succeeding to a share of his natural father's family in the presence of a brother, so that this is not at variance with the general rule. It may be noted too that the case is one of the Karnal District, in a part of the Punjab where, as remarked in 37 P. R. 1910 (*Jhanda Singh v. Kesar Singh*) (3), more stress is laid upon the fact of adoption and its consequences than in other parts of the Province. So the

(1) 68 P. R. 1898.
(2) 59 P. R. 1906.

(3) 37 P. R. 1910.
(4) 100 P. R. 1906.

general custom and the *Riwaj-i-am* are both in favour of the defendants. As to the instances cited by the witnesses for the plaintiffs, they merely shew that an adopted son loses his right to succeed to a share in his natural father's estate in the presence of a brother. This does not help plaintiffs at all.

The *onus* of proving that the defendants, descendants of Surjan are disentitled, by reason of Surjan's adoption, from succeeding to the land left by Surjan's only brother is on the plaintiffs and they have failed to discharge it. The appeal of the defendants is therefore accepted with costs and the appeal of the plaintiffs is dismissed with costs. The decree of the learned Divisional Judge is set aside and that of the First Court dismissing the suit is restored.

Plaintiffs will pay costs in all Courts.

Appeal accepted.

No. 50.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

AHMAD KHAN—(DEFENDANT)—APPELLANT

Versus

RATAN CHAND AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1066 of 1909.

Joint mortgage—legality of releasing share of one of the joint mortgagors—delay in suing, no reason for reducing interest—suit by mortgagee against mortgagors for possession of remaining half of land mortgaged—jurisdiction of Civil or Revenue Court—Punjab Tenancy Act, XIV of 1887, section 77 (3) (c).

The plaintiff held a mortgage of a joint holding by two brothers (defendants) and sued them nearly 12 years after date of mortgage for possession of half the holding in lieu of half the mortgage money and interest thereon at 12 annas per cent. per mensem, he having previously allowed defendant 2 to redeem his half share.

The mortgage was with possession, the land being cultivated by certain occupancy and non-occupancy tenants and the deed stipulated that the mortgagors would assist the mortgagees in recovering the share of produce from the tenants and would make it over to the mortgagees, who would first pay themselves out of it the interest due and amount of Government demand and credit the balance, if any, to the mortgagors against the principal.

Held, that the delay in suing, was no sufficient reason for refusing plaintiffs the full interest contracted in the mortgage deed.

Held also, that the settlement with defendant 2 for his share of the joint mortgage was lawful, although defendant 1 might have his remedy

against defendant 2 by separate suit, if the latter's absolution gave rise to any equities in favour of the former.

Held further, that the suit was not one by a landlord to eject a tenant and was cognisable by a Civil Court.

46 P. R. 1894 (F. B.) (*Buta Shah v. Kalu*) (1), distinguished.

Further appeal from the order of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi, dated 15th June 1909.

Kamal-ud-din, for appellant.

Nanak Chand, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—On 29th July 1896 the two defendants 25th Jan. 1912.
Ahmad Khan and Maddat Khan, who are brothers, mortgaged a joint holding to plaintiff, and Bhagu Mal, deceased father of both plaintiffs, for Rs. 2,200. The land was cultivated by certain occupancy and non-occupancy tenants. Interest was stipulated for at 12 annas per cent. per mensem and mortgagees were to pay the Government revenue, and the deed recites that possession is given to the mortgagees. It was also stated in the deed that the mortgagors would assist the mortgagees in recovering share of produce from the tenants and would make it over to the mortgagees, who would first pay themselves out of it the interest due and the amount of the Government demand and would credit the balance, if any, to mortgagors against principal. In June 1907, defendant 2 satisfied the mortgagees as regards his half of the liability and the latter allowed him to redeem his share. But defendant 1, plaintiffs say, only paid interest and amount of Government demand for the first two years, with the result that at date of suit Rs. 2,080 in all is due from him, of which Rs. 1,100 is principal.

Defendant 1 denied execution by free consent, denied receipt of consideration and promise to pay interest or to deliver possession; and upon the issue drawn on these pleadings, in connection with which the burden of proof was noted by the Court as upon the plaintiffs, the Court found everything in favour of the plaintiffs and granted them a decree in full.

When the case came up on appeal before the Divisional Court, it was first contended that the suit was one for a Revenue Court, being by a landlord to eject a tenant. This point had been taken also in the first Court, though it was not formally put in issue, and both courts found it against defendant 1, the First Court because defendant 1, having denied the validity

of the mortgage and receipt of consideration, was no tenant, and the Lower Appellate Court on the ground that the suit was not by a landlord to eject a tenant but by a mortgagee for possession, the mortgagors not being intermediate tenants between the mortgagees and the cultivators but merely undertaking to assist in recovering the lawful dues from the latter, and defendant 1, holding now not under the mortgagees but adversely to them. On all other points also the Lower Appellate Court endorsed the allegations and contentions of the plaintiffs, and so dismissed the appeal, but without costs. When defendant 1's appeal came before a Judge of this Court in Chambers, he was permitted to put in amended grounds, and it is with this amended memorandum of appeal alone that we have to do. Further, Mr. Kamal-ud-din has dropped para. 4 of the memorandum.

To clear the ground, we may say at once, that there is no reason to doubt the passing of consideration. The deed was a registered one and actual execution has been admitted, and defendant 1 appellant has not been in any way able to shew that he was deceived or coerced into signing the document. No doubt the first item, Rs. 1,000, was on account of the debt due by his father-in-law, Saidu Khan, but he undertook liability and it is for him to shew that he did so otherwise than with "free consent," that is, he must shew undue influence or deception exercised or practised by the mortgagees; and this he has wholly failed to do. Again, we can see no good reason to refuse to plaintiffs the full interest claimed; delay in suing is no sufficient reason for such refusal. Further, we are aware of no law under which mortgagees were prevented from allowing mortgagor defendant 2 to redeem his share. No doubt a joint mortgage is indivisible ordinarily as against joint mortgagors, who cannot without consent of their mortgagee split up the transaction; but we cannot see that the converse rule applies. In our opinion the settlement with defendant 2 for his share was lawful, though, of course, if the settlement and the consequent absolution of defendant 2 give rise to any equities in favour of defendant 1 against defendant 2, no doubt the former can have his remedy against the latter by separate proceeding.

There remains only the question of jurisdiction. Mr. Kamal-ud-din relies upon 46 P. R. 1894 (F. B.) (*Buta Shah v. Kalu*) (1). The head-note of that case sets forth the facts of three separate suits, and the view of this Court was that the first two suits were cognizable exclusively by a Revenue Court,

while the third was a civil suit. Of these cases Mr. Kamal-uddin contends that the first is the one that is similar to the present case. In that, the deed stipulated that possession was to be with the mortgagee, but the plaintiff alleged that at some time thereafter, not stated, mortgagee let the land to mortgagor on a money-rent which was paid regularly until the latter's death and then refused by his sons. We are unable to see how that case is on all fours with the present one, for here mortgagees were to have possession at once and no subsequent subsidiary contract was entered into between the parties.

Nor can we see that the second case dealt with in the Full Bench ruling is parallel to the one before us. There, the mortgagee was to pay the land revenue and receive certain produce as *malikana*, mortgagor remaining in possession, and on default in any year mortgagee had the right to claim possession.

In the present case cultivating possession was with tenants, and the mortgagors were not to keep possession in any true sense of the word. The deed does not say that they shall keep possession, but merely that they shall assist the mortgagees in recovering produce.

The third of the cases in the Full Bench ruling at first sight looks more like the present case than either the first or the second, but in it too there are distinguishing features. The plaintiff no doubt did in that case state, as here, that *malikana* (here produce) had been paid for a time, but plaintiff in his deposition contradicted this, so that his case really was that, though possession had been promised to him in the deed, it had never been given. There obviously no relation of landlord and tenant had actually come into being, though the deed had intended that it should come into being. Here on the contrary, plaintiffs stated and still insist, that for two years produce sufficient to cover interest and land revenue was actually recovered by them, and it is thus apparent that this case must be dealt with on its own facts.

Mr. Nanak Chand for respondent was inclined to argue that the existence of tenants in cultivating possession *ipso facto* made it impossible that the mortgagors could be tenants under the mortgagees; but we are not prepared to adopt this *ratio decidendi*. No doubt the Full Bench all through wrote of "cultivating possession," but that is merely because in the cases before it there were no cultivators below the mortgagors, and we see no difficulty in holding that mortgagors with tenants under them might, by virtue of appropriate stipulations and conditions contract to hold their land "under" their mortgagees.

At the same time we do not think that by the deed before us the defendants remained in possession at all or held "under" the plaintiffs. In our opinion the effect of the deed was to remove the defendants from possession and to leave them in the position of proprietors, whose only connection with the land thereafter was, that they still had the right to redeem; their engagement to assist the mortgagees plaintiffs in recovering produce making them at most in some sort agents for the plaintiffs.

Mr. Kamal-ud-din in reference to this way of dealing with the problem asks why, if defendant was not under the deed left in possession, plaintiffs should sue him for possession, and contends that there is no cause of action against him it being *ex hypothesi* open to plaintiffs to proceed year by year for their rent against the actual cultivators. The answer is easy, defendant 1 is in possession. Plaintiffs pleading simply, that some time after the first two years defendant 1 usurped possession, and defendant 1 himself certainly asserts and defends his own possession. In these circumstances plaintiffs clearly have a cause of action against him; and we must hold that the suit is one for a Civil Court and that plaintiffs have proved their case.

We, therefore, dismiss the appeal with costs.

Appeal dismissed.

No. 51.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MUSSAMMAT NIHAL DEVI—(PLAINTIFF)—APPELLANT

Versus

KISHORE CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1305 of 1910.

Decree—in suit by joint-plaintiffs—must include representative of any of the plaintiffs deceased pendente lite and such representative cannot be excluded on the ground that she has no title to share in the decree.

Held, that where a person sued jointly with others and died during pendency of suit and the widow of his son was brought on the record as his legal representative, any decree passed in favour of the plaintiffs must include the widow as representative of one of the plaintiffs and the Court has no right to exclude her on the ground that she, personally, has no right to any share in the amount decreed.

Vithu v. Bhima (1) referred to.

First appeal from the order of Lala Achhru Ram, District Judge, Ferozepore, dated 15th August 1910.

Broadway, for appellant.

Gobind Das and Kashi Ram, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—Notices issued to the judgment-debtor respondents other than Ude Singh have not been returned after service, but it is unnecessary to adjourn the hearing on this ground, as the appeal relates to a dispute purely between plaintiffs *inter se*, with which the judgment-debtors are in no way concerned. The appellant is Mussammat Nihal Devi, the widow of Nathu Mal, who was the son of one Telu Mal, and the only respondents who are interested in this appeal are Kishore Chand and Kanshi Ram, the nephews of Telu Mal. It appears that in 1897, Telu Mal, Kishore Chand and Kanshi Ram jointly instituted a suit against Ude Singh and others for the recovery of Rs. 17,479-6-9 and that shortly after the institution of the suit, Telu Mal died. Thereupon Kishore Chand and Kanshi Ram applied to the Court to have Nathu Mal, the son of the deceased, brought upon the record as the representative of the latter. The District Judge held, that before this could be done, Nathu Mal must obtain a succession certificate but, before he had had time to comply with that order, Nathu Mal himself died. His widow, Mussammat Nihal Devi, obtained a succession certificate in respect of the estate of her deceased husband and thereafter applied to be brought upon the record of this suit as his representative. The District Judge, despite objections on the part of Kishore Chand and Kanshi Ram, directed, by order dated 29th November 1901, that “Mussammat Nihal Devi’s name be substituted for her deceased husband, Nathu Mal.” From this order the objectors appealed to this Court and on the date fixed for the hearing failed to put in an appearance. The learned Judge before whom the hearing was to have been, noted that Mr. Ishwar Das appeared for Mussammat Nihal Devi, but the appellants had not appeared either in person or by counsel, and that their appeal must therefore be dismissed in default. The learned Judge’s order (which is dated the 12th June 1902) however, proceeded as follows :—“But in case of any subsequent application being made, I observe that the appeal is also shewn to be groundless by the record. The proceedings of the 9th October to the 3rd November 1897 on the vernacular file, seem to shew that the intention of the Court was to enter the name of Nathu Mal as a plaintiff in place of his father, Telu Mal ; now that Nathu Mal has died

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“there is nothing to object to in the addition of his widow’s name in his place.” The appeal was accordingly dismissed, and as a result Mussammat Nihal Devi’s name remained on the record as the representative of Nathu Mal, who was in turn the representative of Telu Mal, one of the original co-plaintiffs.

Subsequently, there was protracted litigation between Mussammat Nihal Devi, on the one hand, and Kishore Chand and Kanshi Ram, on the other, with regard to the claim by the former to succeed, as the heir of her husband, to the latter’s share in the family property. The history and details of this dispute will be found set out in the judgment of this Court which has been published as No. 97 P. R. 1910 (*Mussammat Nihal Devi v. Kishore Chand*) (1). We need not here recapitulate the finding of this Court as embodied in that judgment, and it will suffice for our present purpose to say, that in that case Mussammat Nihal Devi’s claims were held to be time-barred. By the time when the said judgment was delivered the present suit was ripe for decision, but before arguments were heard, Kishore Chand and Kanshi Ram applied to the District Judge for an order, the practical result of which would have been the removal of the name of Mussammat Nihal Devi, as representative of Nathu Mal, from the record. To this Mussammat Nihal Devi, as such representative, naturally objected, and it is common ground with appellant and respondents that the District Judge made no enquiry into the question but simply filed the applications of both parties. The District Judge, thereafter, proceeded to determine the subject matter of the suit as between plaintiffs and the defendants, and found that a sum of Rs. 16,258-0-7 was due to the former from the latter, and passed a decree accordingly. He, however, added the following paragraph to his judgment:—

“This decree is not in favour of Mussammat Nihal Devi, plaintiff, but in favour of the other plaintiffs only. In a recent case between her and plaintiffs, it has been held up to the Chief Court (see Case No. 591 of 1907, decided on the 28th February 1910), that her late husband was a member of a joint Hindu family with the plaintiffs and that her claim for a share in the family property is barred by time as well as on the said account.”

It is to this paragraph and to her exclusion from a share in the decree that appellant, Mussammat Nihal Devi, now objects, and after hearing arguments upon this question, we are of opinion that her objection has considerable force.

The plaintiffs in the present suit were (1) Telu Mal, (2) Kishore Chand, and (3) Kanshi Ram. On Telu Mal's death the District Judge (according to the order of Kensington, J., dated the 12th July 1902), intended to bring Nathu Mal upon the record as the deceased's representative, but as Nathu Mal died before this could be done, the name of his widow was substituted instead. Mussammat Nihal Devi thus came on to the record as the representative (through Nathu Mal) of Telu Mal, and in that capacity she remained on the record to the conclusion of the case. The other plaintiffs, no doubt, after the decision of this Court in the principal case, prayed the District Judge to remove her name from the record, but their prayer was not granted, and in view of the fact that she had been expressly recognised as the representative of Nathu Mal by this Court's order of the 12th June 1902, it obviously would not have been competent to the District Judge to strike out her name. In these circumstances, when the District Judge found that a sum of money was due to plaintiffs, it was clearly incumbent upon him to decree that amount in favour of the persons who were on the record as co-plaintiffs. Had he done so, the decree (so far as Mussammat Nihal Devi was concerned) would have been in her favour merely as the person who was on the record as the representative of Telu Mal, one of the original plaintiffs. The learned Judge has, however, confused the claims which she professes to have as the heir of Nathu Mal against the co-plaintiffs, with the claim which she had, as the duly appointed representative of a deceased plaintiff, against the debtors who were defendants in the suit. The result is that at the last moment and without giving Mussammat Nihal Devi any opportunity of contesting his order by appeal or otherwise, he has practically struck out her name as the representative of Telu Mal, and has given a decree to the remaining plaintiffs who, as the record stands, did not represent the deceased plaintiff.

In our opinion this procedure was erroneous. It is clear from the judgment that all the plaintiffs (including Telu Mal, the deceased), were entitled to share in the amount decreed and, therefore, unless and until Mussammat Nihal Devi's name was duly struck out, the decree should have been in favour of her also as the representative of one of the plaintiffs. The fact that she herself may have no enforceable right against the other plaintiffs to share in the decree, cannot, we think, affect her right, as representative of Telu Mal, to be

recognised for the purposes of this case as a joint decree-holder in such capacity. As observed by the High Court of Bombay in *Vithu v. Bhima* (1), the Court was "clearly wrong in adjudicating by his decree between the rival claims of the two co-plaintiffs on the record, who, if successful as against the defendant, were entitled to a joint decree, which would leave it open to them to adjust their respective claims subsequently."

We accordingly accept this appeal and so far vary the decree of the District Judge as to direct that the decree shall be in favour of Mussammat Nihal Devi, as representative of Telu Mal, deceased plaintiff, and the other plaintiffs jointly.

In so directing we expressly guard ourselves from adjudicating upon any right which Mussammat Nihal Devi may, *in her personal capacity*, possess with respect to any share in the amount decreed. We merely hold that Telu Mal's estate is entitled to share in that amount and that, *for the purposes of this suit*, Mussammat Nihal Devi (who is on the record as the representative, through Nathu Mal, of Telu Mal) *represents* that estate.

Respondents (Kishore Chand and Kanshi Ram) must pay the costs of this appeal.

Appeal accepted.

No. 52.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

NUR AHMAD AND ANOTHER—(PLAINTIFFS)—
APPELLANTS

Versus

RAHIM BAKHSH AND OTHERS—(DEFENDANTS)
RESPONDENTS.

Civil Appeal No. 165 of 1910.

Custom—Succession—self-acquired property—daughter—collaterals in third degree—Rajputs—Rupar Tahsil—difference of daughter's estate by succession and under gift—reversion to donor's heirs.

Held, that by general custom, if a male proprietor makes a gift of self-acquired property to his daughter with the intention of making her the full owner of it, she becomes full owner, but if she inherits it she takes only a limited interest for herself and her issue.

121 P. R. 1908 (page 550) (*Bahadur v. Abdullah*) (2) referred to.

(1) (1890) I. L. R. 15 Bom. 145 (147).

(2) 12 P. R. 1908.

Held also, that a widow who has succeeded to her husband's property cannot alienate it against the wishes of her reversioners, whether the property was self-acquired or ancestral *qua* the reversioners, unless she transfers it to the next heir.

76 P. R. 1883 (page 248), (*Gurdit Singh v. Dittu*) (1), 63 P. R. 1895 (*Gulab v. Mussammatt Ishar Kaur*) (2), and 58 P. R. 1899 (*Sant Singh v. Jowala Singh*) (3), referred to.

Held also, that it had not been proved that among Rajputs of the Rupar *Tahsil* a daughter's son is a preferential heir to collaterals in the 3rd degree.

Held further, that when a widow has gifted her husband's land to his daughter's son, the property goes on the death of the latter without issue not to the donee's collaterals but to the donor's heirs.

53 P. R. 1882 (*Dasaunda Singh v. Mussammatt Partab Kaur*) (4), 46 P. R. 1890 (*Aman Ali v. Massammatt Amina Begum*) (5), differed from.

12 P. R. 1892 (F. B.) (*Sita Ram v. Raja Ram*) (6), 19 P. R. 1903 (*Hayat Muhammad v. Ala Bakhsh*) (7), 144 P. R. 1893 (*Mussammatt Emna Begum v. Jawad Ali*) (8), referred to.

137 P. R. 1908 (*Nihala v. Rahmatullah*) (9) and 84 P. R. 1909 (page 322) (*Gurdit Singh v. Mussammatt Prem Kaur*) (10) distinguished.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ambala, dated 30th October 1909.

Fazl-i-Hussain, for appellants.

Daulat Ram, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—In this case the contest is between, on the one hand, the plaintiffs, who are assignees of defendants Nos. 3 and 5, who are the collateral heirs of Muhammad Bakhsh, and on the other, defendants Nos. 1 and 2, collaterals of Karam Bakhsh, the daughter's son of the said Muhammad Bakhsh. It appears that some twenty years before suit Muhammad Bakhsh's widow, Mussammatt Jian, made a gift of the land in suit, received by her as a widow from her husband, to Karam Bakhsh, having no authority from her husband so to do but acting on her own initiative. The plaintiffs' case is that on the death of Karam Bakhsh without male issue, defendants Nos. 3 and 5 became entitled to the aforesaid land and not defendants Nos. 1 and 2, in whose favour the Revenue authorities effected mutation. Defendants Nos. 1 and 2 denied that defendants Nos. 3 to 5 were reversioners and asserted that the land was acquired

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(1) 76 P. R. 1883.
(2) 63 P. R. 1895.
(3) 58 P. R. 1899.
(4) 53 P. R. 1882.
(5) 46 P. R. 1890.

(6) 12 P. R. 1892 (F. B.).
(7) 19 P. R. 1903.
(8) 144 P. R. 1893.
(9) 137 P. R. 1908.
(10) 84 P. R. 1909.

by Muhammad Bakhsh. There is no doubt now that the land is not ancestral *qua* defendants Nos. 3 and 5, but they are collaterals of Muhammad Bakhsh. The First Court found in their favour and gave plaintiffs a decree.

Against that decree defendants Nos. 1 and 2 appealed to the learned Divisional Judge, who remanded to the First Court for report upon the issue:—"Are defendants-appellants heirs of Karam Bakhsh. If so, in what degree?" In the same order the Judge discussed most of the points in the case. The return was to the effect that defendants Nos. 1 and 2 were collaterals of Karam Bakhsh in the 2nd and 3rd degrees respectively. Thereupon the learned Divisional Judge ruled that defendants Nos. 3 and 5 had no rights at all and so plaintiff's suit must fail. We do not propose in this judgment to follow the Lower Appellate Court through all the reasoning in its remand order. We do not think he has viewed the case in the proper light, but are of opinion that the First Court is right in holding that defendants Nos. 3 and 5 are in all the circumstances to be preferred as heirs to defendants Nos. 1 and 2.

In our opinion the proper way to look at the case is this. The powers of a widow as regards permanent alienation of landed property differ from those of her husband, *cf.* 103 *P. R.* 1907 (page 484), (*Muhammad Umar v. Abdul Karim*) (1). If a male proprietor makes a gift of self-acquired property to his daughter with the intention of making her full owner thereof, she becomes full owner, but if she merely *inherits* such property from him, she does not become full owner, she takes merely a limited interest for herself and her issue—see 121 *P. R.* 1908 (page 550) (*Bahadur v. Abdullah*) (2). But whether the property received by a widow upon her husband's death was acquired by him or is ancestral *qua* reversioners in the field she is equally debarred from alienating it against the wishes of those reversioners, unless, of course, she transfers it to the next heirs—see 76 *P. R.* 1883 (page 248), (*Gurdit Singh v. Dittu*) (3), 63 *P. R.* 1895 (*Gulab v. Mussammatt Ishar Kaur*) (4) and 58 *P. R.* 1899 (*Sant Singh v. Jowala Singh*) (5). The next question, therefore, is whether, among these Rajputs of the Rupar *Tahsil*, a daughter's son is a preferential heir as compared with near collaterals (3rd degree) like defendants Nos. 3 to 5. No doubt there are tribes, such as the Arains, among whom

(1) 103 *P. R.* 1907.(2) 121 *P. R.* 1908.(3) 76 *P. R.* 1883.(4) 63 *P. R.* 1895.(5) 58 *P. R.* 1899.

daughters and their sons are much favoured, but there is no such custom among Rajputs generally, and no special custom has been pleaded here. It follows that the next heirs of Muhammad Bakhsh were defendants Nos. 3 and 5, and apparently they could have contested the gift to Karam Bakhsh. They chose not to do so during donor's or donee's life-time; but it remains clear that the widow could not give to her donee a fuller estate than her own. Even if defendants Nos. 3 to 5 tacitly consented to his having such an estate, and they certainly consented to nothing more—just as on the death of a Rajput widow *her* collaterals do not succeed to her, in the same way on the death of Karam Bakhsh *his* collaterals would not come in. (We may note that it is nowhere contended by defendants Nos. 1 and 2 that Karam Bakhsh held adversely to defendants Nos. 3 and 5, he could not in any case do so until after the death of his donor, Mussammat Jian, which *Patwari* states took place in 1903—article 141, schedule II, Limitation Act, 1877). In our opinion this is where the learned Divisional Judge goes wrong, Karam Bakhsh's was not an absolute estate and could not be so; unless he was heir to Muhammad Bakhsh, apart from the gift, and we have seen that he was not.

But we can go further than this and meet the respondents (defendants Nos. 1 and 2) on their own ground. Even if the gift of the widow be taken to be as good as a gift by Muhammad Bakhsh would have been—the donee not being *heir*—the heirs to the donee, on his line dying out, would be defendants Nos. 3 to 5 and not defendants Nos. 1 and 2, as respondents' counsel contends. It is idle for him to quote such rulings as 53 *P. R.* 1882 (*Dasaunda Singh v. Mussammat Partab Kaur*) (1), and 46 *P. R.* 1890 (*Aman Ali v. Mussammat Amina Begam*) (2), which, no doubt support him, for 12 *P. R.* 1892 (*F. B.*) (*Sita Ram v. Raja Ram*) (3), reinforced by 19 *P. R.* 1903 (*Hayat Muhammad v. Ala Bakhsh*) (4) and 144 *P. R.* 1893 (*Mussammat Emma Begam v. Jawad Ali*) (5), make it clear that the former two rulings are obsolete and should not be followed. Perusal of the three last rulings mentioned shews that succession to an adopted daughter's son, or to a donee-daughter's son, whose line has died out, goes not to the donee's collaterals but to the donor's heirs. Against this respondents' pleader quotes 137 *P. R.* 1908 (*Nihala v. Rahmatullah*) (6), and 84 *P. R.* 1909 (page 322) (*Gurdit Singh*

(1) 53 *P. R.* 1882.(2) 46 *P. R.* 1890.(3) 12 *P. R.* 1892 (*F. B.*).(4) 19 *P. R.* 1903.(5) 144 *P. R.* 1893.(6) 137 *P. R.* 1908.

v. Mussammat Prem Kaur (1), neither of which seems to us to help him at all. The former is a case of a gift by the proprietary body, and in such gifts there is no presumption that the intention was to benefit only the donee and his issue. The principle underlying 12 *P. R.* 1892 (*F. B.*) (*Sita Ram v. Rala Ram*) (2), and 19 *P. R.* 1903 (*Hayat Muhammad v. Ala Bakhsh*) (3), is therefore wanting in cases like that of 1903, which is thus clearly distinguishable. In 84 *P. R.* 1909 (page 322) (*Gurdit Singh v. Mussammat Prem Kaur*) (1), the only question was whether a female donee's daughter succeeds to her in default of sons.

The result is that plaintiff's suit must be decreed, we accept the appeal and, setting aside the Lower Appellate Court's judgment and decree, we give plaintiffs the decree they pray for, with costs throughout.

Appeal accepted.

No 53.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

CHAJJU MAL—(PLAINTIFF)—APPELLANT

Versus

TELU MAL—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 284 of 1909.

Punjab Pre-emption Act, II of 1905, section 11, Proviso—meaning of “agnate.”

In 1885 plaintiff and his two brothers H. D. and N. D. jointly bought land in village Damla and other villages and were recorded as owners.

In 1890 they effected partition under which the Damla land fell to the share of H. D. and N. D., and the latter having died, his share was entered in the name of his widow. In 1896 the widow died and mutation was effected in the names of plaintiff and H. D.

In 1907 plaintiff brought the present suit for pre-emption in respect of a sale effected on the 3rd December 1906 relying on the *proviso* to section 11 of the Punjab Pre-emption Act.

Held, that the widow of his brother N. D. was not an “agnate” of plaintiff's within the meaning of the section and that consequently plaintiff was not recorded for twenty years previous to the date of sale either in his own name or in that of an agnate, and his suit must therefore fail.

95 *P. R.* 1901 (*Muhammad Ayub Khan v. Rure Khan*) (4), referred to.

(1) 84 *P. R.* 1909.
(2) 12 *P. R.* 1892 (*F. B.*).

(3) 19 *P. R.* 1903.
(4) 95 *P. R.* 1901.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ambala, dated 15th May 1908.

Sundar Das, for appellant.

Sheo Narain, Govind Das, and Balwant Rai, for respondent.

The judgment of the Court was delivered by—

JOHNSTONE, J.—On 3rd December 1903, defendant 1 sold the agricultural land in suit to defendant 2. Plaintiff sued for pre-emption. All the parties are *Baniyas* and so are not members of any agricultural tribe as defined in the Pre-emption Act. It follows, see section 11 of that Act, that plaintiff has no *locus standi* to sue unless he can bring himself under the *proviso* to that section. If he can, his suit must succeed, for he is a co-sharer in the same *khata* as that of which the land in suit forms a part, while the vendee owns no land in the village. Other questions were raised in the first Court, but it is unnecessary for us to mention them, as the case can be fully disposed of on the question of plaintiff's right to sue. 1st Feby. 1912.

The first Court has discussed the meaning of the *proviso* aforesaid and has arrived at the conclusion that plaintiff cannot sue. The learned Divisional Judge has held also that plaintiff cannot have the benefit of the *proviso*, and thus both Courts have found against him and have concurred in dismissing his claim.

His petition under section 70 (1) (b) of the Courts Act has been admitted as a further appeal, and we have heard arguments. The problem to be considered can be stated in a few words. In June 1885 Chajju, plaintiff, and his brothers, Harnam Das and Narain Das jointly bought land in this village, Damla, and in other villages and were duly recorded as owners. On 22nd February 1890 they effected a partition, under which all the purchased land in Damla fell to the lot of Harnam Das and Narain Das, Chajju taking his share elsewhere. Narain Das never actually enjoyed his share, for he died on 7th December 1889, while partition proceedings were going on, and so mutation of his share was made (also on 22nd February 1890) in the name of his widow, Mussammat Shibbi. She died in 1896 and mutation of her land was effected on 5th July 1897 in favour of plaintiff and Harnam Das. It thus appears that Chajju was entered as a landowner in *mauza* Damla more than twenty years before suit and continued to be so recorded until 22nd February 1890, when he ceased to be so recorded, coming again on the record (upon the death of Mussammat

Shibbi) in 1897. It is pointed out by Mr. Sunder Das that in 1893 plaintiff purchased other land in *mauza* Damla, but we cannot see that this affects the question before us.

The aforesaid section runs thus, "no person other than a member of an agricultural tribe shall have a right of pre-emption in respect of agricultural land.

"Provided that, if the vendor is not a member of an agricultural tribe, the right of pre-emption may be exercised also by a member of the same tribe as the vendor who is recorded as the owner or as the occupancy tenant of agricultural land in the estate in which the property is situate and has been so recorded for twenty years previous to the date of sale either in his own name or in that of any agnate who has previously held his agricultural land."

Plaintiff, therefore, has to shew that the land which he now holds in *mauza* Damla (or part of it) on the strength of which he claims pre-emption, has been continuously recorded in the Revenue papers for twenty years before suit (*i.e.*, from November 1887) as his property or as the property of an "agnate" of his. He and his agnate Narain Das were recorded as holding their shares from 1887 to 22nd February 1890, and he has himself been recorded as owner since 5th July 1897; but between these two dates Mussammat Shibbi was recorded as owner.

If the *proviso* did not contain the word "recorded"; if the wording of it was "who is the owner" and "who has been the owner for twenty years, etc.," it might possibly be argued that Chajju, plaintiff, became owner immediately on the death of Narain Das and so never ceased to be owner at all, though the widow's life-estate prevented his stepping into possession. But the word "recorded" cannot be ignored, and thus the question for us is whether Mussammat Shibbi can be said to have been an "agnate" of plaintiff. (We may note that the existence of Harnam Das as a co-sharer with Mussammat Shibbi does not help plaintiff for, though Narain Das is no doubt an agnate of plaintiff, he did not hold plaintiff's land.

"Agnate" is a word derived from Roman Law. It included persons related through male ascendants. It may be as Mr. Sundar Das contends, that during a certain period of Roman Law it included females related through male ascendants; but we cannot find that it ever included the wife of an agnate as such. We, however, are inclined to agree with Mr. Shadi Lal in his commentary on the Punjab Pre-emption Act, 2nd Edition, p. 80, where he suggests that the word "agnate"

in section 11 must be taken to have the meaning usually attached to it in this Province in connection with questions of agricultural custom, and no argument is necessary to shew that the writers on Punjab Customary Law and Punjab Tribal Law, and Judges of this Court, who have in countless rulings, discussed that law, have never used the words "agnate" and "agnatic" so as to include the widow of a male agnate. Indeed the whole "agnatic theory," as it has been called, is based on principles which relegate the wife of a member of an agnatic group to a totally different category from that to which the male collaterals related through males belong.

Mr. Sundar Das further argues that we should take cognizance of the fact that the parties are *Banias* and so follow Hindu Law, under which a wife joins the *gotra* of her husband and is in law identified with him and on his death continues his existence, with the result in this case that in law Narain Das should be held to have remained owner of the land until Mussammat Shibbi died. He refers us to paras. 502, 503 of Mayne's Book on Hindu Law and Usage, 7th Edition, but after considering the learned author's remarks we are unable to see that he in any way deals with the question of the meaning of the word "agnate." No doubt, he tells us who are sapindas, but sapindas is clearly not synonymous with agnate, as it certainly includes persons whom even Mr. Sundar Das would hardly call agnates, namely, certain persons connected with the *Propositus* through females; and in our opinion such texts as there may be in Hindu Law declaring a wife a part of her husband and so forth are little more than sentimental pronouncements, for the very different position from her husband's which a Hindu widow takes after his death, is sufficient in itself to shew that she does not continue his existence, *e.g.*, if the deceased husband was joint with a brother, the widow does not even take deceased's share.

We may note, in conclusion, that the Lower Appellate Court relied upon 95 P. R. 1901 (*Muhammad Ayub Khan v. Rure Khan*) (1) but we do not find it of much assistance in the present case, as it deals with a different problem from that before us.

We hold, then, that Mussammat Shibbi as widow of plaintiff's brother, was not an "agnate" of plaintiff as the word is used in section 11, Punjab Pre-emption Act, and we dismiss the appeal with costs.

Appeal dismissed.

No. 54.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.

DYAL SINGH AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

RAM RAKHA AND ANOTHER—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 668 of 1909.

Jurisdiction—power of Appellate Court to pass any decree necessary for the decision of an appeal, which it has jurisdiction to entertain—Punjab Courts Act, XVIII of 1884, section 39.

Plaintiffs sued for possession by redemption of certain land on payment of Rs. 400 ; defendant pleaded that more mortgage money was due to him besides large sums spent upon improvements. The first Court gave a decree for redemption on payment of Rs. 3,770, defendant appealed to the Divisional Court claiming that the amount should have been Rs. 22,000. The Divisional Judge increased the amount payable by the plaintiffs to Rs. 14,258 ; plaintiffs appealed to the Chief Court.

Held, that the first Court's decree being for possession on payment of an amount less than Rs. 5,000, the Divisional Judge had jurisdiction to entertain the appeal, and could consequently pass any decree necessary for its decision, his powers not being limited in this respect.

106 P. R. 1895 (F. B.) (*Muhammad Khan v. Ashak Muhammad Khan*) (1), followed.

98 P. R. 1886 (*Jivan Singh v. Santok Singh*) (2), 44 P. R. 1888 (*Mussammat Rajo v. Dasu*) (3), 169 P. R. 1888 (*Bhag Mal v. Mohra*) (4), 91 P. R. 1889 (*Ranje Khan v. Bir Bal*) (5), 63 P. R. 1891 (*Hazara Singh v. Lal Singh*) (6), 40 P. R. 1892 (*Sardar Kirpal Singh v. Nawab Khan*) (7), 101 P. R. 1900 (*Imam Din v. Ghulam Muhammad*) (8), 58 P. P. 1902 (*Maman Lal v. Abdul Aziz*) (9), 24 P. R. 1903 (F. B.) (*Ghulam Ghaus v. Nabi Bakhsh*) (10), 46 P. R. 1906 (*Manna Lal v. Samandu*) (11), 16 P. R. 1908 (F. B.) (*Muhammad Afzal Khan v. Nand Lal*) (12), 19 P. R. 1908 (F. B.) (*Abdur Rahman v. Charagh Din*) (13), 46 P. R. 1908 (*Fata v. Khan Bahadur*) (14), *Nilmomy Singh v. Jagabandhu* (15) and *Rajlakshmi Dasee v. Katyayani Dasee* (16), referred to.

Further appeal from the order of Major A. A. Irvine, Divisional Judge, Lahore, dated the 12th March 1909.

Tek Chand, for appellants.

Shadi Lal, for respondents.

(1) 106 P. R. 1895 (F. B.).

(2) 98 P. R. 1886.

(3) 41 P. R. 1888.

(4) 169 P. R. 1888.

(5) 91 P. R. 1889.

(6) 63 P. R. 1891.

(7) 40 P. R. 1892.

(8) 101 P. R. 1900.

(9) 58 P. R. 1902.

(10) 24 P. R. 1903 (F. B.).

(11) 46 P. R. 1906.

(12) 16 P. R. 1908 (F. B.).

(13) 19 P. R. 1908 (F. B.).

(14) 46 P. R. 1908.

(15) (1896) I. L. R. 23 Cal. 536.

(16) (1910) I. L. R. 38 Cal. 639.

The judgment of the Court was delivered by—

ROBERTSON, J.—The first question connected with this appeal 30th Jany. 1912. which we have to decide is one of jurisdiction.

The plaintiffs sued for possession by redemption of 203 kanals 4 marlas of land on payment of Rs. 400. The first Court, which was the Court of a 1st Class Subordinate Judge having civil jurisdiction without pecuniary limit, gave a decree for redemption on payment of Rs. 3,770-5-0. From this both sides appealed to the Divisional Court, the defendant-appellant asking for a decree that redemption should not be permitted for a less sum than Rs. 22,000. The decision of the learned Divisional Judge was that possession should be had on payment of Rs. 14,258. It is contended in this Court that, inasmuch as section 39 of the Punjab Courts Act provides that an appeal lies to the Chief Court from a decree of a Subordinate Judge or District Judge in any original suit of value exceeding five thousand rupees, the learned Divisional Judge had no power to hear this appeal and his decision is

ultra vires. Very many rulings* were quoted to us, but it appears that as regards this particular case the one which is most in point is the Full Bench judgment in 106 P. R. 1895 (F. B.) *Muhammad Khan v. Ashak Muhammad Khan* (7). In that case in the original suit the prayer was for a decree for redemption on payment of any sum found to

*98 P. R. 1886 (*Jiwan Singh v. Santok Singh*) (1), 44 P. R. 1888 (*Mussammatt Rajo v. Dasu*) (2), 169 P. R. 1888 (*Bhag Mal v. Mohra*) (3), 91 P. R. 1889 (*Ranje Khan v. Bir Bal*) (4), 63 P. R. 1891 (*Hazara Singh v. Lal Singh*) (5), 40 P. R. 1892 (*Sardar Kirpal Singh v. Nawab Khan*) (6), 106 P. R. 1895 (F. B.) (*Muhammad Khan v. Ashak Muhammad Khan*) (7), 101 P. R. 1900 (*Imam Din v. Ghulam Muhammad*) (8), 58 P. R. 1902 (*Maman Lal v. Abdul Aziz*) (9), 24 P. R. 1903 (F. B.) (*Ghulam Ghaus v. Nabi Bakhsh*) (10), 46 P. R. 1906 (*Manna Lal v. Samandu*) (11), 19 P. R. 1908 (F. B.) (*Abdur Rahman v. Charagh Din*) (12), 46 P. R. 1908 (*Fata v. Khan Bahadur*) (13), *Nilmony Singh v. Jagabandhu* (14), and *Rajlakshmi Dasu v. Katyayani Dasu* (15).

be due after proper adjustment of the accounts. It was pleaded that Rs. 10,000 were due and the Court decided that Rs. 7,558 must be paid on redemption. An appeal was preferred to the Divisional Court and it was held that that Court had jurisdiction to hear the appeal, there being nothing upon the plaint to show that the value of the suit exceeded Rs. 5,000 and that the value of the suit as stated in the plaint

(1) 98 P. R. 1886.

(2) 44 P. R. 1888.

(3) 169 P. R. 1888.

(4) 91 P. R. 1889.

(5) 63 P. R. 1891.

(6) 40 P. R. 1892.

(7) 106 P. R. 1895 (F. B.).

(8) 101 P. R. 1900.

(9) 58 P. R. 1902.

(10) 24 P. R. 1903 (F. B.).

(11) 46 P. R. 1906.

(12) 19 P. R. 1908 (F. B.).

(13) 46 P. R. 1908.

(14) (1896) I. L. R. 23 Cal. 536.

(15) (1910) I. L. R. 38 Cal. 639.

cannot be altered by the plea of the defendant, whether that plea be true or false. The judgment purported to follow the rulings in 169 *P. R.* 1888 (*Bhag Mal v. Mohra*) (1), and 91 *P. R.* 1889 (*Ranje Khan v. Bir Bal*) (2). It was, however, pointed out by the learned pleader for the appellant that the learned Judges, who decided 106 *P. R.* 1895 (*F. B.*) (*Muhammad Khan v. Ashak Muhammad Khan*) (3), overlooked the fact that while it was laid down in 44 *P. R.* 1888 (*Mussammt Rajo v. Dasu*) (4) (also a Full Bench judgment), that the value of the suit depended initially upon the plaint and could not be altered by the pleas of the defendant, when the decision is come to as to the charge upon the land, that charge becomes the value of the suit. And a remark was made in 44 *P. R.* 1888 (*Mussammat Rajo v. Dasu*) (4), which, it is contended, was overlooked in 106 *P. R.* 1895 (*Muhammad Khan v. Ashak Muhammad Khan*) (3) and which restricted the power of the Court to give a decree for the amount found to be the charge to the amount of the pecuniary limit of its jurisdiction; and it may now be taken as settled law that no Court can pass a decree which exceeds the pecuniary limits of its jurisdiction whatever its power *ab initio* to entertain a suit may have been. It is sought to apply this principle to an Appellate Court and to contend that the Lower Appellate Court exceeded its jurisdiction in passing a decree for redemption on payment of Rs. 14,258.

To deal with the first part of the case first, it appears to us clear that the learned Divisional Judge had jurisdiction to entertain the appeal, when first presented. The decision of the first Court was that the charge on the land was Rs. 3,770. The value of the suit was, therefore, Rs. 3,770 and an appeal lay to the Divisional Judge. The fact that the appellant asked for a decree on payment of Rs. 22,000 in the Appellate Court could not affect that, for this really only amounted to the assertion that his plea in the first Court should be accepted, and, although in the form of a claim in appeal, it was, in fact, merely a plea in reply to the original suit and, as such, could not affect the value of the suit for purposes of jurisdiction. Following 106 *P. R.* 1895 (*F. B.*) (*Muhammad Khan v. Ashak Muhammad Khan*) (3) which has never been specifically differed from, so far as has been brought to our notice, we should, as a matter of course, have to hold that the learned Divisional Judge had jurisdiction to entertain the appeal. It is urged that the principles

(1) 169 *P. R.* 1888.(2) 91 *P. R.* 1889.(3) 106 *P. R.* 1895 (*F. B.*).(4) 44 *P. R.* 1888.

laid down in 16 P. R. 1908 (*Muhammad Afzal Khan v. Nand Lal*) (1), which dealt with a suit in which the original Court was incapable, owing to want of jurisdiction, of passing a decree, which it actually did pass, and which was a pre-emption suit, should be applied to the decree of the learned Divisional Judge in this case, and that it should be held that when the Divisional Judge found that the sum to be decreed for payment on redemption was Rs. 14,000 he should have returned the appeal for presentation in the proper Court, *i.e.*, the Chief Court, as beyond his jurisdiction. Now, it appears to us, that there is a very material distinction between 16 P. R. 1908 (*Muhammad Afzal Khan v. Nand Lal*) (1) and the present case. There it was the first Court which had no power to pass a decree which it did pass, and it was set aside accordingly. It is suggested that the decision in that case was not correct, but into that we cannot enter at present. The case is clearly distinguishable. Here we have the case of an Appellate Court properly seized of the appeal in the first instance from a decree which was passed by a Court competent to pass it, passing a decree which cannot be said to be clearly beyond its power to pass. It is true that for the purpose of entertaining an appeal the jurisdiction of the Divisional Court is limited to suits which do not exceed Rs. 5,000 in value. This is a provision simply to provide in the first instance whether the Divisional Court or the Chief Court shall entertain particular appeals. But when an appeal has once been brought and entertained, it does not appear that there is any limit upon the powers of the Divisional Court any more than there is any limit on the powers of the Chief Court. If, for instance, it was found by the first Court that the value of the suit in a pre-emption case exceeded Rs. 5,000, the appeal would lie to the Chief Court; but it can hardly be contended that if the Chief Court found on appeal that the value was only Rs. 500, it would be bound to return the appeal for presentation to the Divisional Court. It appears to us, therefore, that in view of the ruling in 106 P. R. 1895 (*F. B.*) (*Muhammad Khan v. Ashak Muhammad Khan*) (2) and the considerations that we have noted above, it cannot be said that the learned Divisional Judge had no jurisdiction to entertain the appeal. We decide that point against the appellants.

To come to the merits, the plaintiff sued to redeem certain land mortgaged by him originally on 24th August 1866

(1) 16 P. R. 1908.

(2) 106 P. R. 1895 (*F. B.*).

for Rs. 400. Defendants plead that they have enormously improved the property, have planted numerous fruit trees and are entitled to be paid full compensation for these trees before the mortgage can be redeemed. The first Court and the Lower Appellate Court have both made a very exhaustive inquiry into the value of these trees, and they have discussed at great length the question of the existence of old and new gardens, and the case has been argued before us at considerable length. As a matter of fact, however, it is by no means so difficult a matter for decision as regards Civil Courts as the Lower Court seems to have supposed. The first Court found the total sum, which must be paid before redemption on account of compensation and mortgage money, to be Rs. 3,770. Of this Rs. 1,662 consists of mortgage money due on the original deed and some ten subsequent deeds creating further charges on the property, and the remainder is compensation for the trees. The learned Divisional Judge has gone much further and held Rs. 1,662 due on account of mortgage money and Rs. 12,596 on account of value of trees in the two gardens. The decision regarding compensation of both the Courts has perhaps been due to a confusion of mind between the rights of defendants as mortgagees and their rights as tenants. It appears that even before the mortgage of 1866 the defendants were in possession of this land, or some portion of it at least, as tenants and had already planted a considerable garden. What their rights were as regards these trees as tenants is no part of our duty to inquire. What the mortgagor claims is that as mortgagor he is entitled to be put in the position *status quo ante* as regards the mortgagee in respect of the mortgage transaction, and, as we shall shew presently, his contention is one which cannot be resisted. The terms of the mortgage-deed provide for the enjoyment by the mortgagee of the produce of the fruit trees. There is, however, no clause whatever in the mortgage deed which provides that before redeeming the mortgage the mortgagor will pay compensation to the mortgagee in the form of value of these trees or of any other trees. In the settlement of 1868, it is pointed out to us, in regard to certain portion of this land, there are clauses which give the tenant the right to retain possession of the land until the price of the trees is paid. Whether this clause is binding or not or how it should be interpreted, it is not for us, as a Civil Court, to inquire. The plea of the defendant that the landlord, who happens also to be the mortgagor, cannot oust him, the tenant, who happens also to be the mortgagee, from possession of the land as tenant without paying compensation for all the trees under the agreement entered in the settlement record.

is one which cannot be decided in a Civil suit between the mortgagor and the mortgagee. According to Full Bench ruling No. 76 P. R. 1909 (*Haji Muhammad Bakhsh v. Bhagwan Das*) (1) it is clear that this plea, which is one regarding a condition in the terms upon which the tenancy is held, is one which cannot be even entertained by a Civil Court, and, therefore, the question as to what the mortgagee-tenant is entitled to receive by way of compensation before he can be ousted from his possession as tenant, does not arise. The mortgage clearly makes no provision for any compensation of this kind and the mortgagor is entitled to a decree for possession as mortgagor against the mortgagee under the terms of his mortgage, *i. e.*, he is entitled to redeem what was mortgaged and to be put in the same position as regards the mortgagee *quo* the mortgage as he was at the time when he had entered into the mortgage. If the mortgagee has any rights under the conditions of his tenancy and can claim to retain possession as tenant until paid full compensation for the trees, he can plead that, if and when the mortgagor seeks possession through the agency of the Revenue Courts. Or if he thinks he has any claim which he can affirmatively urge before a Revenue Court, he can do so. The decision of this Court that the mortgagor is entitled to possession as mortgagor is not to be interpreted as in any way deciding the question of what rights the defendants in the present suit can urge in bar of a suit, or can claim in a suit, in the Revenue Courts. As regards the Civil Court all that we have to do is to decree possession to the mortgagor on payment of Rs. 1,662, the amount of mortgage money for which the security, which he now seeks to recover, was mortgaged. Each party to bear his own costs throughout.

Appeal accepted.

No. 55.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge, and Hon.
Mr. Justice Rattigan.*

RAM NARAIN—(DEFENDANT)—APPELLANT

Versus

DURGA DAT AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 953 of 1909.

*Insolvency jurisdiction—order of Insolvency Court—how far binding,
in regard to rights in immovable property situate in another Province—objec-*

tor's submission to jurisdiction—Judgment in rem—Indian Evidence Act, section 41—Civil Procedure Code, section 16 (c).

Held, that a creditor who has unsuccessfully opposed his debtor's application in the Bombay High Court to be declared an insolvent, on the ground, *inter alia*, that he had made fraudulent transfers of property, is bound by the decision of that Court and cannot in a subsequent suit filed in the Punjab raise the plea that the transfer of the property was fraudulent and void, notwithstanding that the property concerned is situate in that Province.

The British South Africa Company and the Companhia De Mocambique (1), 122 P. R. 1908 (*Hari Ram v. Kanshi Ram*) (2), *Sardarmal Jagonath v. Aranvayal Sabhapathy* (3), *Ganesh Das Pana Lall v. R. D. Sethna* (4), *In re Rassul Haji Cassum* (5), *Edward Caston v. L. H. Caston* (6), 45 P. R. 1910 (P.C.) (*The Official Assignee, Bombay, v. The Registrar, Small Cause Court, Amritsar*) (7).

First appeal from the order of Bawa Mihan Singh Bedi, District Judge, Amritsar, dated 31st May 1909.

Gobind Das, for appellant.

Sheo Narain and Sukh Dyal, for respondents.

The judgment of the Court was delivered by—

8th Jan. 1912.

SIR ARTHUR REID, C. J.—The first question for consideration is whether the orders of the Bombay High Court on the Insolvency side, dated the 18th December 1908 and the 27th May 1909, concluded as between the appellant and the respondents the question whether the house in suit is the property of the respondent Ida Mal. That respondent applied to the Bombay Court under the Insolvent Debtor's Act, 11 and 12, Victoria Cap. 21, to be declared an insolvent.

Jamna Das Fakir Chand, trading under the name of Lala Ram Narain, present appellant (opposing creditor) opposed the application on several grounds, including fraudulent transfer of property, admittedly including the property in suit. After hearing counsel for this opposing creditor the Court declared the petitioner an insolvent entitled to the benefit of the Act and discharged him from all the liabilities in respect of the debts or claims established, or which might by law be proved in Court in the matter of his insolvency from the date of filing his petition except debts due to three other creditors.

Had the Court not found that the property in suit had not been fraudulently transferred by the petitioner, it would presumably have refused to discharge him from his liability to the present appellant, and would have dealt with him under one of the sections of the Act as a fraudulent petitioner.

(1) (1893) *L. R. App. Cas.* p. 602. (4) (1908) *I. L. R.* 32 Bom. 198.

(2) 122 P. R. 1908. (5) (1910) 13 Bom. L. R. 13.

(3) (1896) *I. L. R.* 21 Bom. 205. (6) (1899) *I. L. R.* 22 All. 270 (F.B.).

(7) 45 P. R. 1910 (P. C.).

It must, therefore, be held that the Court found that there had been no fraudulent transfer of the property in suit.

Counsel for the appellant relied on (1) *The British South Africa Company and the Companhia De MoCambique and others* (1), 122 P. R. 1908 (*Hari Ram v. Kanshi Ram*) (2), Amir Ali and Woodroffe's Evidence Act, notes to section 41 at page 378.

In (1) the principal question raised was, whether the English Supreme Court of Judicature had jurisdiction to try an action to recover damages for a trespass to lands situate in a foreign country.

Herschell, L. C., said that it was not in controversy that prior to the Judicature Acts no such jurisdiction could have been exercised, and held, that the grounds upon which the Courts had until then refused to exercise jurisdiction in such actions were substantial and not technical, and that the rules of procedure under the Judicature Acts had not conferred a jurisdiction which did not exist before. The suit for damages for trespass to the lands in suit was dismissed.

In (2) it was held that a suit, to follow the purchase money of a house in foreign territory, which had been sold by the order of a British Insolvency Court, on the ground that it was not the sole property of the insolvent, and that a certain portion of it belonged to the plaintiff, was a suit "for the determination of any right to or interest in immoveable property" within the meaning of section 16 (d) of the Code of Civil Procedure, and could be instituted only in a Court within the local limits of whose jurisdiction the house is situate.

In (3) it is stated that section 41 of the Evidence Act not only enumerates the different kinds of judgment *in rem*, but also enacts what their effect will be; that this effect is of a limited character and less extensive than that which is allowed at times to judgments *in rem* in English Courts, whose present tendency is, however, to narrow the effect of such judgments, making them binding for their proper purposes only, in accordance with the view which has been adopted by the Indian Legislature; that under the provisions of the section the judgments therein mentioned will operate *in rem* only in respect of those matters of which these judgments are declared to be conclusive proof, parties and privies alone being within the estoppel beyond this.

These authorities do not help the appellant, who was a party to the Bombay insolvency proceedings, while the present suit was instituted in the Court within whose jurisdiction the

(1) (1893) L. R. App. Cas. p. 602.

(2) 122 P. R. 1908.

property in suit is situate, and the Bombay Court had jurisdiction to decide all matters incidental to those proceedings, including the question whether any property in British India had been fraudulently transferred by the petitioner before it.

The further contention that the Bombay Court did not make any declaration under the last paragraph of section 41 of the Evidence Act has no force, the estoppel against the appellant not being limited to the provisions of section 41.

Counsel for the respondents cited (4) *Sardar Mal v. Aranvayal Sabhapathy* (1).

(5) *In re Ganesh Das-Pana Lal* (2).

(6) *In re Rassul Haji Cassum* (3).

(7) *Edward Caston v. L. H. Caston* (4).

In (4) it was contended that a creditor's petition in the Madras Insolvent Court disclosed no act of insolvency which could legally justify an adjudication under section 9 of the Indian Insolvent Act (11 and 12, Vict. Cap. 21) that the adjudication order was, therefore, made by a Court not competent to make it within the meaning of section 44 of the Evidence Act, and that consequently, both it and the vesting order were nullities and the Madras official assignee had no title to the attached property.

It was held that the order, although it might be erroneous and subject to reversal on appeal, was within the competency of the Madras Court, "competency" and "jurisdiction" being synonymous terms.

It was remarked that to hold that the Bombay Court could ignore the order of the Madras Court as being erroneous would be to "erect into a Court of appeal" from the Madras Insolvency Court not only the Bombay Court but every Court in which the official assignee might sue or be sued.

In (5) it was held that the Bombay Insolvent Court had jurisdiction to make an order under section 26 of the Indian Insolvent Act against a person residing outside the Bombay Presidency.

In (6) it was held that, where the official assignee seized and retained property as the property of the insolvent, a third person, who claimed the property as his own and had it in his possession when it was seized, could move the Insolvent Debtors'

(1) (1896) *I. L. R.* 21 *Bom.* 205.

(2) (1908) *I. L. R.* 32 *Bom.* 198.

(3) (1910) 13 *Bom. L. R.* 13.

(4) (1899) *I. L. R.* 22 *All.* 270 (*F. B.*).

Court to investigate the question of ownership and to order restitution thereof, and that it was not obligatory on the third party to file a regular suit against the official assignee for the purpose of obtaining restitution.

In (7) it was held that the competency or jurisdiction of a Divorce Court could not possibly depend on whether a point, which it decided, had been raised or argued by a party or counsel, and that the contention that wherever a decision was wrong in law or violated a rule of procedure, the Court must be held incompetent to deliver it, was obviously unsustainable.

Both sides relied on 45 P. R. 1910 (P. C.) (*The Official Assignee, Bombay, v. The Registrar, Small Cause Court, Amritsar*) (1), but the decision of Their Lordships of the Privy Council helps the respondents only. It was held that under the Indian Insolvents Act, when an adjudication was made by the High Court of Bombay, the estate of the debtor vested in the official assignee and he had to administer it, inasmuch as an order passed under section 27 of the Punjab Laws Act, did not exclude the operation of the vesting order of the Bombay Court.

We have no hesitation in holding that inasmuch as the parties were before the Bombay Court and the appellant accepted the jurisdiction of that Court by filing objections to the petition, the latter is bound by the decision and cannot now raise the plea that the transfer of the property in suit was fraudulent and void. As above remarked, the estoppel is not based merely on the provisions of section 41 of the Evidence Act, and even if it could be held that the decision was not a judgment *in rem*, it was a judgment *inter partes* and binds the appellant. For these reasons we dismiss the appeal with costs.

This disposes of the appeal which is dismissed with costs.

Appeal dismissed.

No. 56.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

DEVIDITTA AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

NATHU AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 962 of 1910.

Civil Procedure Code, 1908, section 11 and order 2, rule 2—previous suit decreed as against some defendants and dismissed as regards the others on

the ground that there was no cause of action against them—fresh suit against the latter, not barred.

Plaintiffs representing one branch of the proprietors of a joint holding, sued the representatives of the other branch, including some persons who had purchased part of their share, for a declaration that partition should be in accordance with entries of Settlement of 1869 and not with the entries of 1879. The defendants-purchasers came to a compromise with plaintiffs to the effect that plaintiffs were entitled to 41 *kanals* 18 *marlas*, the purchasers to 20 *kanals* and the other defendants to 27 *kanals* 11 *marlas*. The latter objected to the terms of the compromise and the Court thereon gave plaintiffs a decree in terms of the compromise against the defendants-purchasers to the effect that they were only entitled to 20 *kanals* and dismissed the claim as regards the other defendants, on the ground that no cause of action had been shown against them, adding that plaintiffs are at liberty to bring another suit against them.

Plaintiffs then brought the present suit against the defendants, against whom their previous suit had been dismissed, impleading the purchasers as co-defendants.

Held, following 66 P. R. 1884 (*Bhola Singh v. Gurdit Singh*) (1) and *Parsotam Gir v. Narbada Gir* (2), that the suit was not barred either under section 13 or order 2, rule 2 of the Civil Procedure Code of 1908.

Further appeal from the order of J. P. Thompson, Esquire, Divisional Judge, Hoshiarpur Division, dated the 1st April 1910.

Sundar Das, for appellants.

Tek Chand, for respondents.

The judgment of the Court was delivered by—

1st Feby. 1912.

RATTIGAN, J.—Plaintiffs' suit for a declaratory decree to the effect that they are entitled to 10 *kanals* 9½ *marlas* of certain land has been dismissed by the Lower Courts, the Subordinate Judge holding that their claim is barred both by limitation and by the provisions of order 2 rule 2, Civil Procedure Code, and the Divisional Judge holding that it is barred under the last-mentioned provisions of the Civil Procedure Code. They have preferred a further appeal to this Court and we have heard the case argued at some considerable length.

The facts are as follows:—

The land in suit belongs to a joint holding of which, in 1869, two branches of the same family were proprietors, plaintiffs are members of one branch being descendants of one Bishna Singh; defendants 1—7 are descendants of Ram Sahai and belong to the other branch. Some time between 1879 and 1906 Darbara Singh, Hazari Lal, Basant Singh, Harnam Singh,

and Sundar Singh purchased a share in this holding from one of the descendants of Ram Sahai and in 1907 three persons applied to the Revenue authorities for partition of the joint holding and contended that the said partition should be effected in accordance with the entries in the Revenue Records of 1879 and subsequent years. In this contention they were supported by all the other descendants of Ram Sahai, but plaintiffs objected that the said entries were erroneous, and that partition must be effected in accordance with the entries in the Settlement Record of 1869 which differed radically from the later entries upon this point.

The Revenue Officer, who dealt with the application for partition, referred plaintiffs to the Civil Courts to establish their contentions and as a result the descendants of Bishna Singh (with the exception of three persons who refused to sue and were, therefore, made *pro formâ* defendants) instituted a suit on the 3rd December 1907 against Darbara Singh, Hazari Mal, Basant Singh, Harnam Singh and Sundar Singh, and the descendants of Ram Sahai (present defendants Nos. 1—7) and certain mortgagees holding under the latter. In this suit plaintiffs claimed that a declaratory decree should be passed in their favour to the effect that partition should be made according to ancestral shares as specified in the Settlement Record of 1869, and in their original plaint, they claimed relief only as against Darbara Singh and his co-vendees. In their amended plaint, however, which was filed on the 27th March 1908, they asked for relief against all the defendants, but in other respects the terms of their plaint remained unamended.

In June 1908 Darbara Singh and his co-vendees compromised their dispute with plaintiffs and the Court thereupon passed a decree against all defendants to the effect that plaintiffs were entitled to 41 *kanals* 18 *marlas* of land; Darbara Singh and his co-vendees to 20 *kanals*, and the other defendants to 27 *kanals* 11 *marlas*. This decree was passed *ex-parte* as against the latter defendants who applied in August 1908 to have the decree set aside in so far as it affected their interest. Their prayer was granted and on the 12th December 1908 the Munsif granted plaintiffs a decree against Darbara Singh and his co-vendees alone, declaring that the latter were entitled only to 20 *kanals* of land. The Munsif dismissed plaintiffs' suit as against all other defendants on the ground that no cause of action had been disclosed as against them, and in his judgment he stated that plaintiffs were at liberty, if so advised, to bring another suit against these defendants.

In January 1909 plaintiffs accordingly brought the present suit and have impleaded as co-defendants all the persons who were defendants in the former suit, with the exception of the three members of their own branch of the family who refused to join as plaintiffs in that suit. These three persons (Gurditta, Kanshi Ram and Lachman Das) have now joined forces with plaintiffs. These being the facts of the case, the question which we have to decide is, whether the present suit is entertainable? The Lower Courts held that it is not, and that it is barred by the provisions of order 2, rule 2 of the Civil Procedure Code. Mr. Sundar Das contends that this decision is erroneous, inasmuch as in the former suit there was no adjudication by the Court upon the question now at issue between plaintiffs and the descendants of Ram Sahai (defendants Nos. 1—7) who are the principal defendants in the present case, and in support of his contention he relies mainly upon the decision of this Court in the case reported as No. 66 P. R. 1884 (*Bhola Singh v. Gurdit Singh*) (1). In that case the plaintiff sued defendants for a declaration of title to a share in the offerings of a certain shrine, and his suit was dismissed upon the preliminary ground that it was not cognisable with reference to section 42 of the Specific Relief Act, as there was consequential relief which the plaintiff could have claimed and had not claimed. This decree having been affirmed on appeal, plaintiff instituted a subsequent suit claiming the consequential relief which he had omitted to claim in the first suit, and it was held by this Court that the second suit was not barred, either under section 13 or under section 43 of the Civil Procedure Code of 1882. Plowden, J., in his judgment points out that in such cases one of three courses may be adopted by the Court. *In the first place*, it may reject the *plaint in limine*, in which case it would clearly be open to plaintiffs to institute a fresh suit. *In the next place*, the Court may entertain the suit and adjudicate upon the matters in dispute. "In this case," the learned Judge remarks, "if the plaintiff institutes a second suit founded on the same cause of action and involving a claim omitted or relinquished in the first suit, or seeking a remedy not sought in the first suit, he brings himself directly within the operation of the final clauses of section 43. So far as the suit regards any relief claimed in the first suit and not granted by the decree, it is governed by section 13, explanation III. As regards any portion of the claim omitted or relinquished or

“any remedy not sued for in the first suit, the suit is expressly prohibited by clauses 2 and 3 of section 43.”

In the third place, the Court instead of rejecting the plaintiff entertains it, but eventually dismisses the suit as the plaintiff is defective in form, at the same time refusing to adjudicate upon the subject matter in dispute. In this case the learned Judge holds that the position of the plaintiff would be precisely the same as if his first suit had been rejected *in limine*. The learned Judge continues:—“The object of section 42 ” (*i. e.* “order 2, rule 1) is not to prevent any litigation, but to prevent further litigation which can be avoided by a plaintiff duly framing the suit, so as to permit a final decision in a single suit. When in the first suit there has been no decision at all on the subject matter in dispute, the second suit is not further litigation within the meaning of section 42 and the second suit is, therefore, beyond the scope of the operation of the final clauses of section 43, even though the plaintiff may seek some remedy or contain some claim omitted or relinquished in the first plaintiff.

“The difference between the first and third cases supposed, namely, when the plaintiff is rejected and when the suit is dismissed, either order being passed on the same ground, is one of form and not of substance. The difference in the form of the order, provided that in each case the Court refuses to adjudicate upon the matter in dispute, seems to be immaterial. This difference cannot enlarge the scope of the operation of the final clauses in section 43, and these clauses, in my opinion, do not apply to either case. The object of these clauses is to prevent further litigation concerning the subject matter of dispute within the meaning of section 42, when the Court has refused to exercise its function, by giving a decision between the litigants on the subject matter in dispute. In either case the plaintiff is, as it seems to me, at liberty, section 43 notwithstanding, to commence proceedings *de novo* and that without any express permission.”

Both learned Judges were of opinion that to such a case section 13 of the Civil Procedure Code of 1882 had no applicability, and Elsmie, J. (while concurring generally with Plowden, J.), added that section 43 does not operate to prevent a man who has lost “a suit merely because it was brought in a wrong form from repairing his error and suing for the proper remedy.”

In our opinion this authority is directly in point and supports appellant's contention. In the former suit their

amended plaint distinctly asked for relief against all the three defendants but the Munsif held that the claim as against present defendants Nos. 1—7 must be dismissed because no cause of action was in express terms alleged against them. That he did not in any sense adjudicate upon the subject matter of dispute between plaintiffs and defendants Nos. 1—7 is obvious from the fact that in his judgment he expressly stated that plaintiffs were at liberty to bring a fresh suit against these defendants, if so advised. The plea of *res judicata* in such a case is clearly untenable, for (as observed by Their Lordships of the Privy Council) in *Parsotam Gir v. Narbada Gir* (1) “it would be a contradiction in terms to say that a Court had finally decided matters which it expressly left untouched and “undecided.” The Munsif in the former suit would probably have rejected the plaint so far as defendants Nos. 1—7 were concerned, had he not been placed in a dilemma. Some of the defendants had compromised matters with plaintiffs and consequently a decree, based on the compromise, had to be passed, and the Munsif obviously felt the difficulty of rejecting a plaint, upon which, so far as some defendants were concerned, he had perforce to pass a decree. He could not, in other words, both accept and reject the plaint and in this position of difficulty he endeavoured to do justice to all parties by passing a decree against the defendants who had come to terms with plaintiffs and by dismissing the suit against the other defendants, granting plaintiffs at the same time liberty to sue the latter *de novo*. Admittedly the Munsif did not attempt to adjudicate upon the subject matter of dispute between plaintiffs and the latter defendants and in the circumstances we held, upon the authorities above cited, that the present suit is not barred either under section 11 or under order 2, rule 2 of the Civil Procedure Code. We accordingly accept the appeal and under order 41, rule 23, we remand the case to the Divisional Judge for decision of the appeal before him. Court fee stamp to be refunded, and costs to abide the event.

Appeal accepted.

(1) (1899) I. L. R. 21 All. 505 (p. 511) (P. C.).

No. 57.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

BADAMAN AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

NET RAM *alias* LALI AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 574 of 1910.

Custom—Succession—heirless estate—proprietors of the Patti—escheat to Government—Riwaj-i-am—Thanesar Tahsil—Wajib-ul-arz.

One Chajju, the only Jat proprietor of the Dudhan *got* in *mauza* Rattangarh, died heirless leaving land in *Thulla* Dayala of *Patti* Jattan of the village. Mutation was made by the Revenue authorities in favour of the proprietors of *Thulla* Dayala. Plaintiffs, the proprietors of the two other *Thullas* in *Patti* Jattan, then brought the present suit for a declaration that they were entitled to succeed to the land jointly with defendants, the proprietors of *Thulla* Dayala.

Held, that the general rule being that heirless land escheats to Government, the *onus* of proving that the proprietors of the whole *Patti* were entitled to succeed was on plaintiffs, notwithstanding their possession.

Held also, that neither the entry in the *Riwaj-i-am* of the Thanesar *Tahsil* in favour of the proprietors of the *Patti* who are of the same *got*, nor the entry in the *Wajib-ul-arz* of the village allowing the proprietors of the village to take possession of the land of a proprietor who leaves the village and is lost sight of and has no heir—could establish the claim set up by plaintiffs and their suit must consequently fail.

102 P. R. 1906 (*Harnam Singh v. Partab Singh*).

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 28th October 1909.

Lajpat Rai, for appellants.

Dwarka Das, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—One Chajju, a Jat of *got* Dudhan, who was a proprietor of certain lands in *Thulla* Dayala, *Patti* Jattan, *mauza* Ratangarh, died about 1908 and admittedly left no lineal or collateral heir. Mutation of names in respect of his estate was in the first instant effected in favour of all the proprietors of the *Patti* Jattan, which comprises *Thulla* Dayala and two other *Thullas*, but subsequently the Revenue authorities rescinded their previous order and directed mutation to be effected in favour of the proprietors of *Thulla* Dayala only. Plaintiffs who are the proprietors of the other two *Thullas*, Basti and Ratan, in the same *Patti*, accordingly sue for a de-

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claratory decree to the effect that, according to law and custom, the proprietors of the *Patti* (i.e., of all three *Thullas*) are entitled to the said land and not merely the proprietors of *Thulla Dayala*. The latter have been made defendants in the suit.

The land is actually in possession of one Buali, a *tehi*, and as this person admits the rights of plaintiffs, the Courts below have held that plaintiffs must be regarded as being in possession, through him, and that their suit for a declaratory decree is entertainable.

Plaintiffs' suit has been decreed both by the District Judge and by the Divisional Judge, and defendants have applied to this Court for revision of those decrees. Their application was admitted as a further appeal, under section 70 (1) (b) of the Punjab Courts Act, and we have heard it argued as such.

In our opinion *onus probandi* was upon plaintiffs who claimed a declaratory decree affirming their right to the land to affirmatively establish their title, and this despite the fact that they happen to be in possession of the land. Admittedly they are not the lineal or collateral heirs of the deceased proprietor, and we know of no authority to the effect that when a village proprietor dies without such heirs, the proprietors of the *patti* or of the village must be deemed to be entitled to succeed to his estate.

The Lower Courts have lost sight of this aspect of the case and have regarded it as a contest purely between the proprietors of the *patti* (plaintiffs) and the proprietors of the *Thulla Dayala*. They have weighed the respective claims of these two parties and because defendants have not been able to show a preferential right to the land, they have granted plaintiffs the decree for which they prayed.

This was an entirely erroneous method of dealing with a case of this kind. There is no presumption that either plaintiffs or defendants are entitled to the property, and as plaintiffs ask the Courts to affirm, by decree, that all proprietors of the *patti* are owners of that property, the burden of proving their claim lay heavily upon them and they were not entitled to the decree unless and until they had succeeded in affirmatively establishing their allegations. The weakness of defendants' case should not have been accepted as proof of plaintiffs' title.

The question then is, whether plaintiffs have proved that they are entitled, together with defendants, to the estate of the deceased.

Admittedly Chajju was the last Jat of the Dudhan *got* in this village, and it is not denied that among the proprietors of the *patti* are Jats of various *gots* and also certain Muhammadans and Brahmins. In such cases the general rule is that in the event of a proprietor dying without heirs, his estate ordinarily escheats to Government (Digest of Civil Law in the Punjab, para. 28). When, therefore, plaintiffs claim a decree declaratory of their right to succeed to the property of Chajju, they are bound to show that this general rule does not apply to their case. What then is the proof adduced by them in support of their claim?

They rely, in the first place, upon the *Riwaj-i-am* of the Thanesar *Tahsil*. The Lower Courts held that this document supports plaintiffs' claim, but we cannot agree. The important clause in the *Riwaj-i-am* is, undoubtedly, No. 47, which provides that in the event of a man dying without *ek jaddis*, all the proprietors of the *patti* who are of the same *got* will succeed. It is not contended that plaintiffs are of the same *got* as the deceased Chajju; but it is argued that in the absence of members of the proprietary body of the same *got*, all other proprietors in the *patti* are entitled to succeed. We cannot accept this argument, for it seems clear to us, after perusal of clauses 40 and 47 of the *Riwaj-i-am*, that the intention was to make provision merely for such collateral relations of the deceased as were unable to prove affirmatively their descent from a common ancestor. In villages in this Province it is often found that certain persons are unable to trace descent from an ancestor common to themselves and a deceased person whose property they claim, and the utmost they can show is that the deceased and themselves were of the same *got*. In such cases Courts are asked to presume descent from a common ancestor simply on that ground. It seems to us that it was to provide for such cases that the entry was made in the *Riwaj-i-am* and that it was not intended thereby to confer rights upon persons who could not possibly have belonged to the family of the deceased. In any case, the entry in question does not directly support plaintiffs' case. The entry in the *Wajib-ul-arz* of 1853 is the next piece of evidence relied upon by plaintiffs, but it affords them even less assistance. It provides that, if a village proprietor goes away or is lost sight of, and there are no heirs (*varisan*), the proprietors of the village can take possession of his land, and that they shall all be responsible for payment of land revenue and other Government demands.

Apart from the objection that this provision relates to the proprietors of the whole village and not merely to the proprietors of the *patti*, it is obvious that it confers no right of succession on owners as heirs. It merely provides that in the event of a proprietor leaving the village, if there are no heirs to the property, the whole village will have to bear the burden of paying Government demands, and that as some compensation the proprietary body of the village may take possession of the derelict property (see as to this 102 *P. R.* 1906 at p. 362, *Harnam Singh v. Partab Singh*) (1). It is conceded that the oral evidence in this case is of no value and thus plaintiffs' claim rests solely upon the entries in the *Riwaj-i-am* and the *Wajib-ul-arz*. These, as we have shown, do not establish their right to succeed to Chajju's property and their claim must therefore fail. In granting them the declaratory decree for which they prayed the Courts below were (as has been already remarked) misled by regarding the case as one merely between plaintiffs and defendants. They are of opinion that defendants have no preferential or exclusive right to the property and they lay stress upon the fact that the *Thullas* in the village are mere artificial units, without (as the Divisional Judge says) any recognisable *raison d'être*. Finding then that defendants have no exclusive right to the property, they conclude that plaintiffs' contention must be correct and that it devolves upon the proprietors of the *patti*. This is clearly a case of *non sequitur* and the Courts have lost sight of the fact that before plaintiffs can claim the decree asked for, they must prove not merely that defendants have no exclusive right to the property, but also that they themselves have a right to claim the declaration for which they pray. This they have entirely failed to prove and we, therefore, accept the appeal and dismiss plaintiffs' suit with costs throughout.

How far this decision will benefit either party is a matter with which we are not concerned.

Appeal accepted

(1) 102 *P. R.* 1906.

No. 58.

*Before Hon. Mr. Justice Robertson and Hon. Mr. Justice
Shah Din.*

SHERU—(DEFENDANT)—APPELLANT

Versus

JAWAHIR SINGH—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 716 of 1910.

*Punjab Pre-emption Act, II of 1905, section 19—withdrawal of deposit,
no bar to appeal—legitimacy of son of a Jat by his wife, a sweeper woman—
Benami pre-emptor.*

Held, that the withdrawal by the plaintiff in a pre-emption suit of the deposit made under section 19 (1) (a), Punjab Pre-emption Act, subsequent to the decision of the suit by the Court of first instance, is no ground for rejection of the plaint by the Appellate Court and does not bar an appeal by the plaintiff.

Held further, that the fact that the pre-emptor was instigated to prefer his claim by the vendees, who supplied him with the necessary funds on a mortgage of the land sold, apparently with the object of defeating another suit by a rival pre-emptor, does not prove that he is acting *benami* for the vendees and therefore does not debar him from suing.

19 P. R. 1898 (*Ramsukh Das v. Fazal-ud-Din*) (1), and 7 P. R. 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*) (2), followed.

*Further appeal from the order of W. A. LeRossignol, Esquire,
Divisional Judge, Amritsar Division, dated the 2nd May 1910.*

Ram Bhaj Datta, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.—Rai Sukh Diyal for the respondent, Jawahir Singh, raises the preliminary objection that as the appellant, Sheru, has withdrawn from Court the purchase money, including the sum of Rs. 300, which he had deposited in pursuance of an order passed under section 19 of the Pre-emption Act, II of 1905, his plaint must be rejected and he is, therefore, precluded from prosecuting this appeal. We do not, however, see our way to accept this contention. As laid down in Civil Appeal No. 23 of 1907 (decided by Robertson and Chevis, JJ., on the 24th May 1907) section 19 of the Pre-emption Act does not provide for a case in which the pre-emptor, after having made the necessary deposit under sub-section (1) (a) of that section, has withdrawn it subsequent to the decision of the suit. The penal provision of sub-section (3) comes into operation only if

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the pre-emptor fails within the time fixed by the Court to make the deposit or furnish the security mentioned in sub-section (1), but once the deposit is made in pursuance of the order of Court within the time fixed by it, the Court has no power to reject the plaint by reason of the subsequent withdrawal of the deposit. We, therefore, overrule the preliminary objection and proceed to dispose of the appeal on merits.

The facts of this case are fully given in the judgment of the Divisional Judge. One Dina sold the land in dispute to certain vendees on the 5th June 1908 for Rs. 5,000. On the 20th June 1908 Jawahir Singh, respondent, sued to pre-empt the land on payment of Rs. 3,900. On the 3rd July 1908 Sheru, appellant, who is a minor grandson of Dina, vendor, also brought a suit for pre-emption. Each rival pre-emptor was impleaded as a defendant in the suit of the other and each filed certain pleas in answer to his rival's claim. Jawahir Singh pleaded, *inter alia*, that Sheru's father, Budha, was not the legitimate son of Dina, vendor, being born of a sweeperess who had not been divorced by her first husband Tabi, and that therefore Sheru was not a member of the *Jat* tribe to which Dina belonged and had no right to claim pre-emption. He further pleaded that Sheru was a *benami* pre-emptor who had brought his suit, not for his own benefit, but in the interests of the vendees whose right was admittedly inferior to that of Jawahir Singh. It is unnecessary to notice the other pleas at this stage of the proceedings, as no other question has been argued before us in this appeal.

The District Judge held that Sheru's father Budha, was a legitimate son of Dina, being the lawful issue of a valid marriage between Dina and Mussammatt Saddam and that Sheru, being admittedly the legitimate son of Budha, was a member of the *Jat* tribe and as such entitled to bring a suit for pre-emption. He further held that, although Sheru had raised money for payment into Court by mortgaging the land in dispute in favour of the vendees, his right of pre-emption was not thereby defeated on these grounds, the District Judge granted a decree to Sheru on certain terms as to payment of the purchase money into Court which are set forth in his judgment. In the event of Sheru not complying with those terms Jawahir Singh was declared entitled to the possession of the land as pre-emptor.

On appeal by Jawahir Singh, the Divisional Judge without going into the question, whether or not Sheru's father was a legitimate son of Dina and a member of the *Jat* tribe, held that Sheru had brought his suit for pre-emption in the interests of

the defeated vendees and not for his own benefit, and on that ground he accepted Jawahir Singh's appeal and dismissed Sheru's suit.

Sheru has preferred a further appeal to this Court, and the two questions which we have to decide in this appeal are:—

(1) * * * *

(2) Whether the suit brought by Sheru has been rightly dismissed on the ground that it was not brought by him *bonâ fide* for his own benefit, but only in the interests of the defeated vendees?

* * * *

In connection with the second question, the admitted facts are that Sheru's suit was brought after Jawahir Singh had filed his suit; that the money deposited in Court under section 19 of the Pre-emption Act was advanced by the vendees; that the money which was paid into Court in compliance with the decree passed in favour of Sheru by the District Judge had been advanced on a mortgage of the land in suit by the father and nephew of the vendees; that the mortgage was for a fixed period of ten years and the conditions of the mortgage were such as to make redemption difficult after the expiry of the period fixed by the deed. In view of these facts the respondent's advocate has urged that the suit by Sheru, appellant, is not a *bonâ fide* one; that it has been brought in the interests of the defeated vendees and for their benefit; and that, therefore, it has been rightly dismissed by the Divisional Judge. We have every sympathy with the difficult position in which the respondent, Jawahir Singh, is placed, as we have no doubt that it is the vendees, who have instigated Sheru to bring his suit and who are supplying him with the necessary funds to prosecute it. But it by no means follows that Sheru is a *benami* pre-emptor simply because he is instigated by the vendees to pre-empt the land and he would not have been able to bring his suit without their help. If his right of pre-emption is superior to that of Jawahir Singh, that right cannot be defeated because his object in prosecuting the suit is to prevent Jawahir Singh from getting the land, and because he has raised funds for that purpose by mortgaging that land to the vendees. The right view to take in such cases is the one propounded by a Division Bench of this Court in 19 P. R. 1898 (*Ram Sukh Das v. Fazal-ud-Din*) (1). At page 50 of the report, the learned Judges say:

“ Now there may be authority for holding that when it is
“ proved that a plaintiff in a pre-emption suit is acting *benami*,
“ that is, that another person will, on the plea that he is the real
“ purchaser, be entitled to take from plaintiff whatever may be
“ decreed him, the Court should refuse the nominal plaintiff a
“ decree. But there is no authority for holding that a plaintiff
“ may not enter into any agreement with others as to what he
“ will do with the land if he gets it and thus raise funds for the
“ maintenance of his suit. In such a case the plaintiff is entitled
“ to his decree and if, after obtaining it, he proceeds to transfer
“ the land, a fresh cause of action will arise to other pre-emptors.
“ It would obviously be most inconvenient and improper to try
“ suits for pre-emption not on the true issues of the case itself,
“ but on side issues raised by pleas of the defendant as to agree-
“ ments alleged to have been entered into by the plaintiff as to
“ the future disposal of the property.” The latest authority on
the subject is No. 7 P. R. 1912 (*Mahmud Bakhsh v. Hassan Bakhsh*) (1). Following the above rulings, we hold that the facts relied upon by Jawahir Singh, respondent, are insufficient to prove that the suit of Sheru, appellant, is one brought by a *benami* pre-emptor. We accept the appeal and setting aside the decree of the Lower Appellate Court we grant a decree to Sheru, appellant, for possession of the land in suit on payment of Rs. 1,500 to the vendees on or before the 31st March next, vailing which the suit shall stand dismissed with costs. In the event of Sheru not paying the money into Court within the period specified, Jawahir Singh, respondent, would be entitled to the possession of the land on payment of Rs. 400 to the vendees, the balance of Rs. 3,500 being payable to the prior mortgagees on redemption. As the present litigation has been fostered by the vendees, and as the appellant brought the suit at their instigation and has succeeded only on a technical view of the law of pre-emption, we direct that the appellant pay the respondent's costs throughout and that the vendees pay the appellant's costs in this Court.

Appeal accepted.

(1) 7 P. R. 1912.

No. 59.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MUSSAMMAT BAKHTAWARI—(DEFENDANT)—APPELLANT

Versus

SHIBBAN LAL AND ANOTHER—(PLAINTIFFS)—AND
BANU MAL—(DEFENDANT)—RESPONDENTS.

Civil Appeal No. 786 of 1910.

Punjab Alienation of Land Act, XIII of 1910, section 9 (3)—Foreclosure proceedings, whether still "pending" after District Judge's order consigning record to Record-room but before expiry of year of grace—reference to Deputy Commissioner—necessity of strict proof of procedure for foreclosure under Regulation XVII of 1806.

In February 1909, plaintiff sued for possession as owner of certain land, mortgaged to him by way of conditional sale. Foreclosure proceedings had been taken and notice was issued in October 1900 and in December 1900 the District Judge made an order consigning the record to the Record-room. The year of grace expired in October 1901, and previous to that, on 8th June 1901, the Punjab Alienation of Land Act had come into force. The Lower Courts found that the proceedings for foreclosure has been validly completed.

Held, that on these findings, no reference to the Deputy Commissioner under section 9 (3), Punjab Alienation of Land Act was called for, as there were no proceedings for the enforcement of the conditional sale clause "pending" before the District Judge after the order in December 1900 consigning the record to the Record-room.

But *held also*, that it was for plaintiff to prove affirmatively that each and all of the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 had been duly fulfilled and that as the notice issued did not bear the District Judge's seal, as required by section 8, the foreclosure proceedings were bad in law, and consequently as the mortgage still subsisted, the case must be referred to the Deputy Commissioner under section 9 (3) of the Act for such action as he might think fit to take.

16 P. R. 1888 (*Mussammat Lachmi v. Tota*) (1), 106 P. R. 1889 (*Kirpa Ram v. Bhagwana*) (2), 105 P. R. 1907 (*Bhagirath v. Nath Mal*) (3), *Madhopersad v. Gajadhar* (4), and 185 P. R. 1889 (F.B.) (*Sham Singh v. Karm*) (5) referred to.

Further appeal from the decree of H. A. Rose, Esquire, Divisional Judge, Ambala Division, dated the 20th August, 1909.

Govind Das, for appellant.

Shadi Lal, for respondents.

(1) 16 P. R. 1888.
(2) 106 P. R. 1889.

(3) 105 P. R. 1907.
(4) (1884) I. L. R. 11 Cal. 111, p. 117 (P. C.).
(5) 185 P. R. 1889 (F. B.).

The judgment of the Court was delivered by—

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RATTIGAN, J.—On the 18th July 1894, one Jewan Singh executed a mortgage of certain lands by way of conditional sale in favour of defendant, Banu Mal, who on the 5th December 1896, sold his rights under the said deed in favour of plaintiffs.

In October 1900 plaintiffs had notice of foreclosure issued (it is alleged) through the District Judge to the mortgagor, and on the 3rd December 1900 the proceedings were ordered by the District Judge to be consigned to the Record-room. The year of grace expired in October 1901 and in the meantime (*i.e.*, on the 8th June 1901) the Punjab Alienation of Land Act (XIII of 1900) had come into force. In February 1909 plaintiffs sued for possession of the land, and as Jiwan Singh and his son, Surta, were both dead, the suit was brought against Mussammat Bhaktawari, the widow of Surta.

Defendant urged numerous pleas in defence, *inter alia*, that she knew nothing of the alleged mortgage; that it was, in any event, invalid for want of consideration and necessity; that the alleged foreclosure proceedings were null and void inasmuch as (1) there had been no previous demand for payment, (2) notice had not been duly served upon the mortgagor, and (3) that the notice issued by the District Judge was not in proper form. The District Judge found 4 issues which dealt merely with the questions whether the mortgage had in fact been effected and if so, whether it had been effected for consideration and necessity.

Upon these issues he found (1) that the mortgage had been effected; (2) that there were consideration and necessity for the alienation but that a large amount was due for interest, and that only Rs. 1,800 were legally chargeable upon the land. At the same time as the mortgage deed contained a clause providing for conditional sale, he referred the case, under section 9 (3) of the Punjab Alienation of Land Act to the Deputy Commissioner for such action as that officer might deem fit to take. His judgment is dated 2nd August 1909, and no decree seems to have been drawn up by him until October 1909 when for the first time he drew up a decree in favour of plaintiffs for the sum of money which he found to be due to them.

From this decree the plaintiffs appealed to the Divisional Judge and prayed that in lieu thereof they might be granted a decree for possession of the land *as owners*, the year of grace having expired long prior to their present suit. The Divisional Judge found that full necessity and consideration had

been established and held that the District Judge was not justified in cutting down interest from Rs. 2,175 to Rs. 550. He held that the sole issue in the case was whether plaintiffs could be regarded as vendors or merely as mortgagees and that for a decision to be given upon that issue, it was necessary to find out whether the foreclosure proceedings had been valid or not. He accordingly remanded the case for enquiry, as to (1) whether the mortgagor duly received notice of plaintiff's application under Regulation XVII of 1806, and (2) whether plaintiffs had demanded payment of the mortgage money from the mortgagor prior to issuing notice. He added that "if the plaintiffs prove that the proceedings to make the sale absolute were valid, they will, under Punjab Record 88 of 1909, be clearly entitled to possession as vendees and the Deputy Commissioner will have no power to intervene."

The District Judge, upon the remand, found in favour of plaintiffs upon both the points upon which further enquiry had been ordered, and upon the case coming before him again after the return to his order of remand, the Divisional Judge agreed with these findings and held that the foreclosure proceedings had been validly completed. In accordance with this finding he held that as prior to the date of the present suit, the year of grace had elapsed, the present claim must be treated as one by a vendor for possession and that consequently section 9 (3) of the Punjab Alienation of Land Act had no applicability. He therefore accepted the appeal and granted plaintiffs the decrees for which they prayed.

Defendant has preferred a further appeal to this Court and we have heard lengthy arguments upon questions of no little difficulty. It has, for instance, been urged before us that in the circumstances of the present case the rights of the mortgagee did not mature into rights of ownership because while the year of grace was still running, the Act above referred to came into operation and rendered it imperative on the part of the District Judge to refer the case to the Deputy Commissioner. As we have remarked, the year of grace did not expire till October 1901 and the Act came into force in June 1901. Notices had issued and had been served on the mortgagor before December 1900, when the District Judge directed the record to be consigned to the Record-room. Mr. Govind Das contends that, despite this order, the proceedings for the enforcement of the condition, intended to operate by way of conditional sale, must be held to have been pending before the District Judge at the date of the commencement of the

Act; that the District Judge was therefore bound in law to refer the case to the Deputy Commissioner, and that his failure to do so, vitiated all the proceedings and acted as a bar to the mortgagee's right to claim that the year of grace had in due course expired.

As at present advised, we are not disposed to accede to this argument. It seems to us that upon the facts as above stated there were no proceedings for the enforcement of the conditional sale clause "*pending*" before the District Judge after he had directed the consignment of the record to the Record-room. After this order had been passed, the case cannot reasonably be regarded as having been *pending* before the District Judge. No doubt it was open to either party to move him to take fresh cognizance of the case, and equally no doubt, he could himself have called for the record and brought the case once more upon the file of cases *pending* before him. But it is admitted that he did not do so, and in the circumstances we are of opinion that this objection must fail. It is also questionable whether in any event the omission on the District Judge's part to comply with the provisions of section 9 (3) of the Act would necessarily render it impossible for the mortgagee's rights to mature into ownership by expiry of time.

But as we are unable on other grounds to maintain the decree of the Divisional Judge we need not further discuss those questions. In cases such as the present, where a mortgagee sues for possession of the mortgaged property upon the ground that he has become owner thereof under the terms of the conditional sale clause, it is incumbent upon him to prove affirmatively that each and all of the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 have been duly fulfilled. In other words, he must show that the foreclosure proceedings were valid in every respect. As observed in No. 16 P. R. 1888 (*Mussammatt Lachmi v. Tota*) (1), his plaint, if correctly framed, should distinctly "allege, not only that the year "of grace had expired, but that the procedure prescribed by "law, both preparatory to and in connection with the notice of "foreclosure, had been duly observed. It is only the complete "observance of this procedure, coupled with the non-payment "by the mortgagor of the sum due upon the mortgage within "the year of grace that gives the plaintiff a right to enforce "forfeiture of the mortgagor's estate, and a plaint which did "not set forth the particulars above mentioned would be open "to the objection of not discharging a complete cause of action,

“etc. . . . A plaintiff who neither sets forth these necessary particulars in his plaint, nor adduces any proof in support of the special relief which he seeks to enforce, cannot avoid the consequences of his neglect by merely relying on the circumstances that the defendant did not plead the non-observance of the prescribed procedure, but defended the suit on other grounds.” (Cf. also No. 106 P. R. 1889 (*Kirpa Ram v. Bhagwana*) (1).

In the present case the Divisional Judge observes :—

“Exception is now taken, for the first time, to the defects in the notice served, *e.g.*, to the absence of the District Judge’s seal and the omission to specify section 7 of the Regulation. So little did these prejudice the present mortgagor that she never specified them till the second hearing here. I rely on No. 105 P. R. 1907 (*Bhagirath v. Nath Mal*) (2), which admittedly overrules in part some earlier rulings.” We need not consider whether certain *obiter dicta* in the ruling cited by the Divisional Judge are or are not entirely consistent with the earlier decisions of this Court, because in this case (as the Divisional Judge himself points out in his order of the 5th January 1910) the defendant admittedly took the first possible opportunity of objecting that the notice was irregular in form.

True, she did not specify the irregularities, but in view of her objection, it was especially incumbent upon the plaintiffs to prove affirmatively that there was no flaw in that notice. And in any event, as the notice was before the learned Judge at the hearing of the appeal, the specific objections then taken by the defendant to the validity of that notice should have been considered by him and not brusquely brushed aside simply and solely because her objections had not previously been set forth in detail.

Turning now to the objections to the notice urged by the defendant, we find, after reference to the record of the foreclosure proceedings, that the notice did state that the mortgagor must redeem in the manner provided for by section 7 of the Regulation. This objection, therefore, fails.

But the other objection, namely that the notice is invalid as it did not bear the seal of the District Judge, is well founded. The notice bears the signature of the District Judge, but the seal is wanting.

Section 8 of Regulation XVII of 1806 provides that when the Judge has received the written application therein referred to, he "shall cause the mortgagor or his legal representative to be furnished as soon as possible with a copy of it and shall at the same time notify him by a *parwana* under his seal and official signature that if he shall not redeem the property mortgaged," etc. Their Lordships of the Privy Council have pointed out that these provisions are not merely directory but imperative, prescribing conditions precedent to the right of the mortgagee to enforce forfeiture of the estate of the mortgagor, and have for their object to protect mortgagors who are often poor and ignorant men, from fraud and oppression on the part of money-lenders, and that therefore the prescribed procedure must be strictly followed (*Madhopersad v. Gajadhar*) (1). Following this decision of their Lordships, the Full Bench of this Court held that a notice which bore the seal of the District Judge but not his signature and only some illegible initials without any official designation, did not comply with the provisions of the said section, No. 185 P. R. 1889 (F. B.) (*Sham Singh v. Karm*) (2). Thereafter the Division Bench in the same case hold that as the procedure did not comply with the requirements of the Regulation and it being well recognized law that any failure to comply with the Regulation strictly, is fatal to a suit for foreclosure, plaintiff's suit must be dismissed.

In our opinion the omission to affix the seal of the District Judge upon the notice is an even more serious defect than the absence of the Judge's official signature, and as the notice issued to the mortgagor in this case did not in that important particular comply with the requirements of the Regulation, the foreclosure proceedings were bad in law. The result is that the year of grace cannot be regarded as having duly expired and that the plaintiff's rights under the mortgage deed have not matured into ownership.

The original mortgage accordingly subsists and plaintiffs' present suit for possession as vendees must fail.

The Divisional Judge in his order dated the 5th January 1910 describes the suit as one by plaintiffs for possession as vendees of the land in suit. But it was not so regarded by the District Judge and the decree passed by the latter is based upon the assumption that the mortgage, as such, is still subsisting and that plaintiffs' claim is based upon it. It was upon this view of the case that he granted plaintiffs a money decree. From that decree the defendant preferred no appeal and it must therefore be held binding upon her.

(1) (1884) I. L. R. 11 Cal. 111, p. 117 (P. C.).

(2) 185 P. R. 1889 (F. B.).

But plaintiffs are dissatisfied with that decree and seek possession of the land either as mortgagees or as vendees. We hold that they are not vendees and the Courts below are agreed that the mortgage is not open to objection on the score of want of consideration or necessity. In the circumstances, as the mortgage still subsists we must refer the case to the Deputy Commissioner under section 9 (3) of the Punjab Alienation of Land Act for such action as he may think fit to take. The appeal is accepted with costs throughout and the decree of the Divisional Judge is set aside. If the Deputy Commissioner declines to take action under section 9 of the said Act, the record will be returned to this Court for further orders.

Case remanded.

No. 60.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

**SALIG RAM AND OTHERS—(JUDGMENT-DEBTORS)—
APPELLANTS**

Versus

LALA RAI CHAND—(DECREE-HOLDER)—RESPONDENT.

Civil Appeal No. 1009 of 1911.

Indian Limitation Act, IX of 1908, article 182—step in aid of execution—application to be allowed to bid.

Where, in execution proceedings, property was put up to auction, but no one bid, and thereon decree-holder's pleader applied for permission to his client to bid and the Court's order on this was "ordered as prayed" and the Court ordered, as re-auction was to be held within a week, that permission to bid be granted to the decree-holder and the sheriff be informed that he should re-auction on a certain date.

Held, that the application of the decree-holder was, that a step in aid be taken, the re-auction being a step in aid.

88 P. R. 1884 (*Maulvi Mohammad Shaffee v. Budri Mal*) (1) distinguished.

*Further appeal from the order of W. A. LeRossignol, Esquire,
Divisional Judge, Hoshiarpur, dated 7th August 1911.*

Sukh Dial, for appellant.

Tek Chand, for respondent.

The judgment of the learned Chief Judge was as follows:—

SIR ARTHUR REID, C. J.—A preliminary objection, that no 7th Feby. 1912.
appeal lies, is based on the terms of order XLIII, rule 1 (a) of the Code of Civil Procedure, 50 P. R. 1911, and the contention that the value of the suit and decree was less than Rs.

2,500 and that no appeal from a decree maintaining the decree of the Court of first instance lay.

The reply was that the order of the Appellate Court was a decree in execution proceedings and that the appeal to this Court was really under section 40 (1) (a) (i) of the Punjab Courts Act.

In my view of the merits of the appeal it is unnecessary to decide this objection :

Although it was decided in 88 P. R. 1884 (*Maulvi. Mohammad Shaffee v. Budri Mal*) (1) that an application by a decree-holder for permission to bid was not a step in aid of execution within the terms of article 179 (4) of the Limitation Act, the judgment indicates that the application was made before the auction was held, granting the application would consequently not have necessitated re-auction or a fresh auction.

The facts of the present case are clearly distinguishable. The auction was held on the 7th April 1905. No one bid. The sheriff reported this and his report was laid before the Court on the 11th April. The decree-holder's pleader then and there applied for permission to his client to bid, and that the sheriff be informed. The order passed on this application "was ordered as prayed" and the Court ordered that, as re-auction was to be held within a week, permission to bid was granted to the decree-holder and that the sheriff should be informed that he should re-auction on the 15th and report on the 20th April.

I concur with the Lower Appellate Court, on these facts, in the conclusion that the application of the decree-holder was that a step in aid be taken, the re-auction being a step in aid.

Limitation was, therefore, saved and I dismiss the appeal with costs.

Appeal dismissed.

No. 61.

Before Hon. Mr. Justice Shah Din.

UDHO RAM AND OTHERS—(PLAINTIFS)—APPELLANTS

Versus

RODA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 494 of 1909.

Custom—Pre-emption—in town of Dasuha.

Held, that the custom of pre-emption in respect of house property exists in the town of Dasuha, Hoshiarpur District.

Further appeal from the order of Major G. C. Beadon, Divisional Judge, Hoshiarpur, dated the 25th June 1908.

Sheo Narain, for appellants.

Sukh Dial, for respondents.

The judgment of the learned Judge was as follows:—

SHAH DIN, J.—A return has now been received to my order of remand, dated the 16th March 1910. The learned Divisional Judge has discussed in chronological order 15 instances in which the custom of pre-emption in respect of house property was held to exist in the town of Dasuha, and his opinion is that the custom is fully established. In summing up the result of the inquiry in the concluding portion of his return he says:—

“In cases (1), (3), (6) and (12) the point of custom was in dispute, and the custom was in each case found to exist. There is no case in which a decision has been given against the existence of the custom. In cases (4), (5), (7) to (10) and in (14) the custom was admitted. In case (15) the precedent of No. 12 was followed, and the custom was found to exist throughout the town. In case (1), moreover, it was found that there had been instances before 1869 in which the pre-emptors had stepped in.”

The learned Advocate for the respondents is obliged to concede that there is overwhelming evidence on the record of the existence of the custom of pre-emption in Dasuha, and he has therefore refrained from addressing me on behalf of his clients with a view to shew that the return submitted by the Divisional Judge is not based on correct *data*. I therefore hold that the custom of pre-emption in respect of house property does exist in the town of Dasuha, and I, accordingly, accept this appeal and setting aside the decree of the Lower Appellate Court, send the case back for a fresh decision under order XLI, rule 23, Civil Procedure Code.

The stamp on this appeal will be refunded and other costs will be costs in the cause.

Case remanded.

No. 62.

Before Hon. Sir Arthur Reid, Chief Judge.

MISTRI HARI SINGH—(DEFENDANT)—APPELLANT

Versus

MUSSAMMAT BHOLI AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 467 of 1910.

Custom—Pre-emption—Ferozepore City, Kucha Nihal Singh, Mohalla Multani Darwaza.

Held, that Kucha Nihal Singh in the city of Ferozepore is comprised in Mohalla Multani Darwaza, a sub-division of the city, in which the custom of pre-emption prevails.

44 P. R. 1903 (*Muhammad Nawaz Khan v. Mussammat Bobo Sahib*) (1) referred to.

Further appeal from the order of T. P. Ellis, Esquire, I.C.S., Additional Divisional Judge, Ferozepore, dated the 27th August 1909.

Dwarka Das, for appellant.

Shadi Lal, for respondents.

The judgment of the learned Chief Judge was as follows:—

15th Feby. 1912.

SIR ARTHUR REID, C. J.—The Lower Appellate Court has recorded in its judgment that “Mohalla Multani Darwaza” is a fairly well known entity” in the city of Ferozepore and that Mohalla or Kucha Dhobian is in Mohalla Multani Darwaza.

On the plan on the record, the accuracy of which is not contested, the house in suit, in Kucha Nihal Singh, which is admittedly a street or lane of not more than 12 or 13 houses, is shown to be separated by one house and a Police guard room only from the Multani Gate.

The *Purana Bazaar* is a street which is the main street through and from the Multani gate, the Police guard house of that gate being on each side of it. Kucha Dhobian (or Daula) runs into this street on one side, and Kucha Nihal Singh runs into it from the other side, the two *kuchas* being nearly opposite to one another.

The Lower Appellate Court has recorded that in 1876 part of the plaintiff-respondent's house was acquired by them by pre-emption, and that the right was established in the

neighbourhood. In 44 P. R. 1903 (*Muhammad Nawaz Khan v. Mussammât Bobo Sahib*) (1) a finding of a Divisional or District Judge that the right of pre-emption prevailed in *Mohalla Dhobian* was relied on, though the sub-division in which *Kucha Dhobian* is situate, is described as *Jamnuwali Masjid*. The Lower Appellate Court has recorded that this *masjid* is within the city walls, it has not been shown to be distant from the house in suit. The ruling above cited is authority for holding that the existence of the right of pre-emption in *Kucha Dhobian* entails its existence in *Kucha Nihal Singh*. The finding therein that *Mohalla Kassaban* was an independent sub-division was based on the fact that the *mohalla* was a fairly considerable area comprising several streets and lanes, and the Lower Appellate Court's finding of fact that *Mohalla Multani Darwaza* is a well known "entity" in the city justifies the conclusion that it comprises *kuchas* as near the gate as are *Kucha Nihal Singh* and *Kucha Dhobian*, and I see no reason for differing from the Lower Appellate Court's conclusion that these two *kuchas* are in the same sub-division of the city. For these reasons, I maintain the finding that the house in suit is subject to pre-emption and I see no reason for interference under section 70 (1) of the Courts Act from the assessment of the sum payable on pre-emption.

The appeal fails and is dismissed with costs.

Appeal rejected.

No. 63.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.

SANT SINGH AND OTHERS—(DEFENDANTS)
APPELLANTS

Versus

SADDA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 241 of 1910.

Custom—alienation—by way of adoption—power of collaterals to contest such alienation in regard to non-ancestral property—effect of adoption discussed.

Held, that under customary law a childless proprietor has the power of alienating his property if non-ancestral *qua* his collaterals, in any way he pleases and that consequently the collaterals of such a proprietor are not entitled to obtain possession of his non-ancestral land to which a person

adopted by him has succeeded by virtue of his adoption, even though *per se* the validity of the adoption may be open to question.

In such cases adoption has the same effect as a gift of his land by the adoptive father to the adopted son.

The effect of adoption under customary law discussed.

170 P. R. 1882 (*Chamba v. Jochahir Singh*) (1), 130 P. R. 1884 (*Mussammatalia Bibi v. Mussammatal Budhi*) and 50 P. R. 1893 (F. B.) (*Ralla v. Budha*) referred to.

Further appeal from the order of W. Chevis, Esquire, Divisional Judge, Gujranwala, at Lahore, dated 13th January 1910.

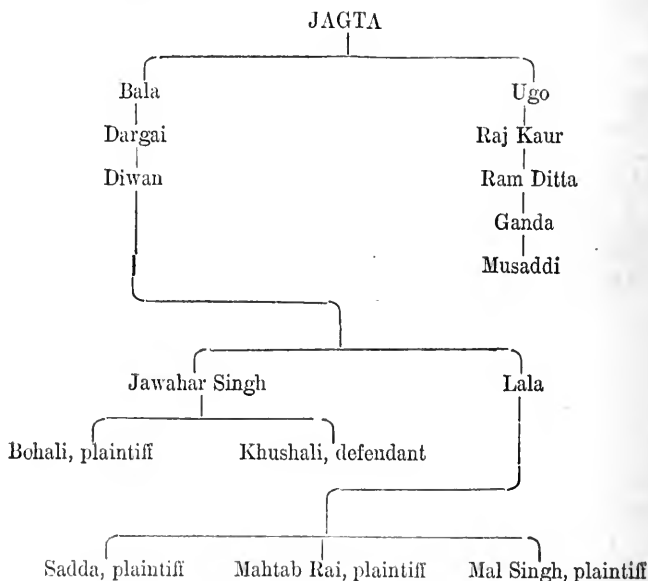
Shadi Lal, for appellants.

Sukh Dial and Bhagirath Lal, for respondents.

The judgment of the Court was delivered by—

17th Feby. 1912.

SHAH DIN, J.—The following pedigree explains the relationship of the parties :—



The land in dispute, which is situate in *Kila Didar Singh, tahsil Gujranwala*, was left by Musaddi, a Virk Jat, who died in September 1908. The plaintiffs, grandsons of Diwan, who are collaterals of Musaddi in the sixth degree, have sued for possession of the land in question on the ground that the defendant, Dial Singh, who is sister's grandson of Musaddi and who claims to be in possession of the land as his adopted son, is not entitled to hold possession of the same, both because the alleged adoption never in fact took place, and also because, if

(1) 170 P. R. 1882.

(2) 130 P. R. 1884.

(3) 50 P. R. 1893 (F. B.).

it did take place, it was invalid. One of the pleas raised by Dial Singh in answer to the plaintiffs' claim was that the land in dispute had been acquired by Ganda, father of Musaddi, deceased, that therefore it was not the ancestral property of Musaddi *qua* the plaintiffs; and that consequently the plaintiffs had no *locus standi* to contest the validity of the adoption in question. The Court of first instance held that the land in suit had been acquired by Ganda; that the plaintiffs had no *locus standi* to impugn the adoption of Dial Singh by Musaddi and that the *factum* and validity of the adoption in question were established. On these grounds the plaintiffs' suit was dismissed. On appeal, the Divisional Judge held that the adoption actually took place, but that according to the custom governing the parties it was invalid. The learned Judge did not consider and decide the question whether the land in suit was ancestral as regards the plaintiffs or not, as he held that according to the law as he understood it, a collateral could contest an invalid adoption unaccompanied by a gift interfering with his succession, even if the property were the self-acquired property of the adoptor. The plaintiffs' appeal was therefore accepted and their suit decreed except as regards the share of Khushali who had not joined the plaintiffs in the suit.

In further appeal the first contention raised by Mr. Shadi Lal, counsel for defendant Dial Singh, is that the land in suit having been acquired by Musaddi's father, Ganda, the plaintiffs who meet Musaddi in the sixth degree, are not competent to challenge the validity of the adoption of Dial Singh by Musaddi, for the simple reason that customary adoption being only another form of gift, the adoption in question must be treated as a gift of the land in suit by Musaddi in favour of Dial Singh for the purposes of the present litigation. In other words, since an alienation of the land in question, which was the non-ancestral property of Musaddi *qua* the plaintiffs, could not be contested by the plaintiffs, the adoption of Dial Singh by Musaddi, which only means the appointment of an heir and is intended to have the same effect as an alienation of his property by the adoptive father in favour of the adopted son, must be held to be valid so far as the plaintiffs are concerned. We think that this contention is well founded and must prevail.

That the land in suit was acquired by Ganda, father of Musaddi, and not by Jagta, the common ancestor of Musaddi and the plaintiffs, does not, in our opinion, admit of any doubt. Kila Didar Singh, in which the land is situate, was carved out of village Deorhi Varaich; and the history of the new village

as given in the Settlement of 1868, read with a note to the pedigree-table of Deorhi Varaich prepared at the same Settlement, shews beyond doubt that Ganda had abandoned his ancestral land in the latter village and had gone and settled in Kila Didar Singh where he purchased land for himself. It is not disputed that the land in suit is the identical land. We hold therefore, in agreement with the Court of first instance, that the land in dispute was not the ancestral property of Musaddi *qua* the plaintiffs.

The sole question then for decision is whether the plaintiffs have a right to recover possession of the land in suit by impugning the adoption of Dial Singh by Musaddi, deceased, which constitutes the sole title by which Dial Singh has succeeded to that land. It is not disputed by the plaintiffs' advocate that, if Musaddi had transferred the land in question to Dial Singh by a gift *inter vivos* or by will, the plaintiffs would not have been competent to challenge the alienation; but he contends that the adoption of Dial Singh by Musaddi has not the same effect as a gift by Musaddi in his favour, inasmuch as Musaddi never parted with possession of the land in his own life-time and remained its owner till his death. He also urges that the deed of adoption cannot be construed as a will, because it was never intended to be treated as such, and also because whereas a will could be revoked by Ganda at any time before his death, the adoption once made could not be set aside. In support of the latter contention the learned advocate relies on No. 170 P. R. 1882 (*Chamba v. Jowahir Singh*) (1) and No. 130 P. R. 1884 (*Mussammatt Talia Bibi v. Mussammatt Budi*) (2).

In No. 170 P. R. 1882 (*Chamba v. Jowahir Singh*) (1) the defendant, who was an *Arora*, claimed to succeed as the adopted son of a Jat proprietor, who had executed and registered a deed declaring the defendant to be his adopted son and entitled to succeed as such on his death. On a question being raised as to whether the deed which purported to be a deed of adoption could be given effect to as a will, it was held by this Court that it could not. Barkley, J. in the course of his judgment said:—

“Next as to the argument that the deed, though it purports “to be not a will, which is a revocable instrument, but a deed of “adoption, which is irrevocable, can be given effect to as a “will. I do not think that we would be justified in disregarding the real character of the deed, to give it an effect which “it was never intended to have. The reference to the adopted

“son being as such the heir of the adoptor, is merely incidental,
 “describing one of the effects of the adoption, and if the adoption
 “fails, this reference cannot be given the operation of a
 “testamentary disposition. It is essential to a will that the
 “person making it should intend it to operate as such, and a
 “statement by a man that another person is his adopted son,
 “and therefore his heir, is not equivalent to a will in his favour,
 “in case it is found that there was no valid adoption.”

It will be observed from the above passage that the view taken by the learned Judge as to the real nature and operation of the deed then in question was determined largely by its language ; and the decision cited is not an authority for the proposition that in no case can a deed of adoption be construed as a will in favour of the adopted son. The construction to be put on the deed of adoption in the present case must be determined by its contents and not by what was decided by this Court in another case with reference to another deed.

In No. 130 P. R. 1884 a Division Bench of this Court construed a deed of adoption executed by a *Kashmiri Shaikh* in favour of a minor as a deed of gift and not as a will, and in interpreting the deed in question the learned Judges had special regard to its language. They said :—

“Next, assuming for a moment the document of October 1872 was a genuinely executed one, we are quite unable to regard it as a will, or as anything but an unstamped and unregistered deed of gift. To our view, it operates to pass the property in Habibullah's life-time, and not at his death, to the lad. The language seems to be piled, one sentence on another, in order to make this intention clear, while the concluding words as to why the document was written in no wise clash with this, as an oral gift to an infant would be likely enough to be contested after the donor's death, if no document had been forthcoming. Holding it then to be a gift and not a will at all, we do not think it can be allowed to operate in a mode not within the writer's contemplation when executing it. In this we are only following a previous decision of this Court, *Chamba v. Jowahir Singh* (*Punjab Record* of 1882, No. 170) ” (1).

It is clear from both the decisions cited above that in each case a deed of adoption must be construed according to its language and in the light of attendant circumstances ; and no hard and fast rule can be laid down on the subject. In some cases a deed of adoption may well be construed as a deed of

gift; while in others, a gift *inter vivos* may not be contemplated, and the adoptive father's intention may simply be confined to the appointment of the adopted son as his heir, who would, as such heir, succeed to his property after his death. In other cases, again, the adoptive father, while declaring that he had adopted the particular individual concerned as his son, may at the same time proceed to leave his property to him by way of a bequest; and in such cases, there is no reason why the deed of adoption should not be construed as one containing a testamentary disposition of property as well. All that No. 170 *P. R.* 1882 (*Chamba v. Jowahir Singh*) (1), can be taken to have decided was that the particular deed of adoption propounded in that case was not a will, not that under no circumstances can a deed of adoption be held to operate as a will.

In the present case it is unnecessary to decide whether the deed of adoption executed by Musaddi in favour of Dial Singh is or is not a deed of gift or a will, as in our opinion the property in dispute being the non-ancestral property of Musaddi as regards the plaintiffs, he had every power to transfer it in any way he pleased to Dial Singh; and this he has done by adopting him, or, in another words, by appointing him as his heir so as to enable him to succeed to the property in suit after his death. The nature of a customary adoption and the power of a sonless man among the Punjab agriculturists to adopt a son are thus explained by Sir Meredyth Plowden in the well-known Full Bench case No. 50 *P. R.* 1893 (*F. B.*) (pp. 230—231) (*Ralla v. Buda*) (2).

“What then is the power of adoption, and does it form an exception to the general rule, which gives the *warisan* ‘*ekjaddi* or the *karabatian*—that is to say the agnate kinsmen, or at least the near agnate kinsmen—a power of control over dispositions of ancestral land made by a sonless owner to their detriment?”

“The power to adopt is a power in a sonless man, not merely to take a male person whether of his own genealogical family, or of another, and to treat him as a son, but also to constitute an heir, in lieu of a son, that is, to enable a person who is not a son to succeed to ancestral land held by the adoptor as if he were his son.”

“The power of adoption, when validly exercised, has precisely the same effect as regards the *warisan ekjaddi* or presumptive heirs, as a valid transfer of the adoptor's land

(1) 170 *P. R.* 1882.

(2) 50 *P. R.* 1893 (*F. B.*).

“by gift to the adopted son would have; it operates in fact
“as a transfer of his land, but a transfer taking effect after the
“death of the donor instead of in his life-time.”

“The power to adopt is valued by the landholding tribes
“in the Punjab, as it appears, not for the sake of any supposed
“spiritual benefit, but on more practical grounds; because it
“enables a sonless man to secure for himself a companion, who
“shall be a fellow worker, and a support in old age, and to
“make provision for him in return for his services. It is
“to be expected that this power, as it is capable of being
“exercised to divert the devolution of ancestral land from its
“ordinary course, should be as jealously guarded, in the in-
“terest of the presumptive heirs, as other similar powers,
“and I think it is unquestionable that, speaking generally,
“it is so guarded.”

It is clear from the above extracts from the judgment of Sir Meredyth Plowden, that among agriculturists in the Punjab the power of adoption has the same effect as regards agnates or presumptive heirs of a sonless proprietor as a valid transfer by him of his land by gift to the adopted son would have; and it follows that the heirs of the adoptor who trace their descent along with him from a common ancestor, would have the right by custom to interfere with his power of adoption only in cases where they would have a right to control his power of disposition in respect of the land to which the adopted son would succeed by virtue of his adoption. Customary adoption is only one mode by which the normal devolution of a sonless proprietor's property according to ordinary rules of inheritance is altered; it operates in fact, as pointed out by Sir Meredyth Plowden, as a transfer of his land, but a transfer taking effect after his death instead of in his life-time. If, then, the nature of the property so transferred by adoption in favour of the adopted son is such that the agnatic relations of the adoptor could not object to an alienation of it by him, they should have no right to impugn the adoption, by means of which the adoptor effectually transfers that property to the adopted son. It would certainly be anomalous if the collaterals were competent by custom to impugn the adoption and to recover from the adopted son the property so transferred to him, though if a gift of the property *inter vivos* or by will had been made by the sonless proprietor concerned in favour of a perfect stranger, between whom and such proprietor there existed no sort of personal relationship such as is implied in customary adoption, they would be unable to prevent the

transfer of the property taking full effect to the detriment of their own right of succession.

That an adoption has, generally speaking, the same effect as a gift is emphasized by Sir Charles Roe, in his well-known work on "Tribal Law in the Punjab". At page 22 of that work the learned author says:—

"The other modes by which the succession (to the ancestral property of a sonless owner) may be altered are adoption, or the appointment of a sole heir, and gifts, either *inter vivos* or by will. I have elsewhere shewn how intimately the two subjects of adoption and gift are bound together in the minds of the people."

Again at page 76 he says:—

"As remarked by several Settlement Officers, the questions of adoption and gift are in the minds of the people mixed up together.....It is true that it is said that gifts must always be accompanied by possession, but this does not mean, and the Courts have not interpreted it as meaning, that the donor must at once relinquish all interests in the gifted property. It is only intended that, as in adoption, there should be some definite, irrevocable act, creating a fresh interest in the estate; and possession is considered to be sufficiently given if the donee is taken by the donor to reside with him or joined with him in the management of the property. The reasons for gifts and adoption are the same; the custom regarding them are practically the same, and whenever the validity of a gift or an adoption is in question, the answer under both heads should be read together. It may in fact be said that where an alienation in favour of a person who is not the natural heir is allowed the Hindu tribes call the transaction an adoption and the Muhammadan tribes call it a gift." At page 108, the same idea is expressed in different words:—

"A gift, as understood by Customary Law, is merely the means by which the tribes who do not recognize the adoption *eo nomine*, permit under certain circumstances a sonless man to divert the succession to his estate from the natural heirs in favour of some near relative who has rendered, or is expected to render, service, and who would be adopted if adoption were recognised.....It thus happens that in most of the cases which have come before the Courts the customs regulating adoption and gifts have had to be considered together....."

“The remarks of Sir Meredyth Plowden, S. J., already “quoted shew that the custom with regard to all alienations “of ancestral property (except for necessity) rests on the “same general principle, that the holder for the time being “cannot by his own voluntary act, under whatever form he “may clothe his act, whether he calls it an adoption, a gift, “or a distribution, or a sale, divert the succession from his “natural heirs without their consent. And first as in the “case of an adoption the Customary Law insists on a definite “public act of adoption, in the presence of, or with full notice “to, the brotherhood or at any rate the agnates interested, so “also in the case of gifts it insists on a delivery of possession.”

The above passages appear to us to contain a sound exposition of the principles of Customary Law governing gifts and adoptions among agricultural tribes in this Province; and generally speaking, the rule to be observed in regard to the validity of adoptions is that an adoption, or the appointment of an heir, can be questioned by the presumptive heirs of an adoptor only in cases where a gift by the latter of the land which would go to the adopted son by virtue of his adoption can be impugned by those heirs. And it follows as a sound corollary from that rule that as a gift of non-ancestral land by a sonless proprietor cannot be questioned by his collaterals who do not trace their descent from a common ancestor who held that land, so an adoption by such proprietor of a non-heir as a son made with a view to enable the latter to succeed to such land is not liable to be contested by them.

For the above reasons, we hold that the land in suit being the non-ancestral property of Musaddi *qua* the plaintiffs, the latter are not entitled to recover possession of it from Dial Singh on the ground that his adoption by Musaddi was not valid. All that we decide in this case is that the plaintiffs are not competent by custom to contest the adoption of Dial Singh so far as his right of succession to the land in suit is concerned; the question as to what other rights he has or will have as adopted son of Musaddi is not now the subject of dispute and we express no opinion on that point.

We accept the appeal, and setting aside the decree of the Lower Appellate Court we restore that of the first Court with costs throughout.

Appeal accepted.

No. 64.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MUSSAMMAT BHAMPFUL DEVI—(DEFENDANT)—
APPELLANT

Versus

RAI SAHIB BAHADUR HARBAKSH SINGH AND
OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1299 of 1909.

Civil Procedure Code, 1908, section 47—donee of property from judgment-debtor under money-decree, not latter's representative—separate suit by decree-holder to have gift declared void, maintainable.

Where a judgment-debtor under a money-decree, while application for execution was pending, transferred the whole of his property to his wife by way of gift.

Held, that a suit by the decree-holder to have the gift declared void was not barred by section 47, Civil Procedure Code, 1908, the donee not being a "representative" of the judgment-debtor within the meaning of that section.

Madho Das v. Ramji Patak (1) followed.

Ishan Chunder Sirkar v. Beni Madhub Sirkar (2), *Dwar Buksh Sirkar v. Fatik Jali* (3), *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (4) and *Surendra Narain Singh v. Gopi Sundari Dasi* (5) distinguished.

Held also, that as the gift was found to have been a mere sham, effected with the object of trying to save the judgment-debtor's property from the decree-holder, the latter's suit must succeed.

First appeal from the decree of H. E. A. Wakefield, Esquire, District Judge, Ambala, dated the 2nd November 1909.

Balwant Rai, for appellant.

Dwarka Das, for respondents.

The judgment of the Court was delivered by—

23rd Jan'y. 1912.

RATTIGAN, J.—On the 5th January 1901 Bawa Gurbakhsh Singh, the brother of plaintiff No. 1 and father of plaintiff No. 2, obtained a money-decree against the four sons of one Hosiar Singh (*viz.* Bakhtawar Singh, Dilawar Singh, Umrao Singh and Dulip Singh).

In that suit Bakhtawar Singh acted as the duly appointed guardian *ad litem* of his two minor brothers, Umrao Singh and Dulip Singh, and he and his elder adult brother Dilawar Singh, acting for themselves and on behalf of their minor brothers, confessed judgment, and in accordance with this confession of judgment the said decree was passed against all four defendants.

(1) (1894) *I. L. R.* 16 *All.* 286.

(2) (1896) *I. L. R.* 24 *Cal.* 62 (*F. B.*).

(3) (1898) *I. L. R.* 26 *Cal.* 250.

(4) (1902) *I. L. R.* 29 *Cal.* 813.

(5) (1905) *I. L. R.* 32 *Cal.* 1031.

This decree provided that the defendants should pay the three plaintiffs the sum of Rs. 5,018 within one year, without interest, but that on their failure to make such payment, they should pay the sum of Rs. 5,718, with interest at the rate of As. eight *per cent. per mensem*, together with costs.

Five years later the two minors, Unrao Singh and Dulip Singh, sued for cancellation of this decree so far as it affected them, and succeeded in their suit. The result was that Bakhtawar Singh and Dilawar Singh alone remained liable to satisfy the decree. The decree-holders, therefore, proceeded to execute the decree against the two above mentioned and, while applications for execution were pending, the judgment-debtors by two separate deeds, both executed on the 6th August 1907, transferred the whole of their respective properties, Bakhtawar Singh to his minor sons, Jagdip Singh and Jajindar Singh, and Dilawar Singh to his wife, Mussammat Bhamphul Devi.

In the present case we are concerned only with the deed of gift in favour of Mussammat Bhamphul, and with the other deed we shall have to deal in the connected appeal (No. 335 of 1909).

Dilawar Singh, as we have observed, gifted the whole of his property to his wife on the 6th August 1907 and he lost no time in having mutation of names effected in her favour, so far as the agricultural land was concerned.

In April 1908 the decree-holder applied for attachment of the property gifted to Mussammat Bhamphul, and it was attached accordingly in June 1908. Mussammat Bhamphul thereupon objected to the attachment on the ground that the property belonged to her and the District Judge, in his order, dated 8th February 1909, upheld these objections and released the property from attachment.

The decree-holder's representatives in interest have now brought this suit and they pray for a declaratory decree to the effect that the said deed of gift by Dilawar Singh to Mussammat Bhamphul is null and void as against them, being a merely fictitious transaction effected to defraud them of their rights, and that the said property is liable to attachment and sale in execution of their decree.

The defendants to this suit are (1) Mussammat Bhamphul, (2) Dilawar Singh, and (3) the minor sons of Bakhtawar Singh, the latter being obviously *pro forma* defendants.

At first neither Mussammat Bhamphul nor Dilawar Singh put in any appearance, and the latter expressly declined to act

on behalf of the minors. The District Judge accordingly appointed the Civil Nazir guardian *ad litem* of the minors and proceeded to frame two issues, which were as follows :—

- “ (1) Can a suit lie for cancellation of alienation of
“ property on the ground that the alienation is
“ intended to defeat execution of a money-decree,
“ and if so,
- “ (2) Was the deed of gift, executed by Dilawar Singh
“ in favour of his wife, Mussammat Bhamphul,
“ merely with the intention of defeating plaintiff's
“ money-decree ?

The hearing of the case was adjourned to the 9th June for evidence “on both sides,” but the actual hearing took place on the 10th June. On that date the Pleader for Mussammat Bhamphul appeared and agreed that the two issues covered all the points in dispute.

The District Judge thereupon adjourned the case to the 28th July 1909 and directed defendants to put in written statements in order to make the case complete and to produce their evidence also on that date.

The next hearing took place on the 29th July 1909, and it was found that the record of the case was in the Chief Court. The District Judge, however, proceeded to take the evidence of two witnesses who were present on plaintiff's behalf—defendants putting in no appearance on this date. At the close of the examination in chief of these witnesses the District Judge adjourned the case till the following day in order that defendants might have a further opportunity of appearing. The next day defendant No. 1's Pleader appeared and cross-examined the said two witnesses and another witness who was produced by plaintiff on that day. On this occasion the defendant's Pleader took no exception to the proceedings on the ground that the record was in the Chief Court, and that he was in consequence hampered in his cross-examination of the witnesses. The next hearing took place on the 12th October 1909 and by this time the record had been returned to the Court of the District Judge. Two more witnesses for plaintiffs were examined and cross-examined and then defendant No. 1 produced two witnesses whose evidence was in due course taken, whereupon her Pleader declared that his case was closed.

The case was further adjourned from time to time, partly in order to enable plaintiffs to file copies of certain deeds, the originals of which were in possession of defendants, and partly because the Court had no time to hear the case on the date

fixed. The case was finally adjourned to the 2nd November 1909 on which date arguments were heard and judgment delivered. The District Judge has held (1) that as Mussammat Bhamphul was no party to the suit in which plaintiffs obtained a decree against Dilawar Singh, the present suit is not barred by the provisions of section 47, Civil Procedure Code; and (2) that the alleged gift in favour of Mussammat Bhamphul was entirely fictitious. He has accordingly granted plaintiffs a decree with costs against Dilawar Singh and Mussammat Bhamphul to the extent of any of the property transferred to her which may remain in her possession, declaring that the property in dispute is attachable in execution of plaintiff's decree, and that the deed of gift in her favour is invalid. From this decree defendant No. 1 has preferred an appeal to this Court and Mr. Balwant Rai, her learned Pleader, has in the first instance taken exception to the proceedings of the District Judge upon the grounds—(1) that issues were framed without any pleadings of defendants being recorded; (2) that witnesses for plaintiff were examined and cross-examined at a time when the record of the case was not in the District Court; and (3) that the District Judge did not record the evidence of one Ghulam Kadir, for whose attendance defendant had duly paid process-fee and diet-money. In our opinion, there is no force whatever in these objections. It is clear from the record (1) that the Pleader for defendant No. 1 accepted the issues, as framed by the District Judge, as sufficient to cover all points in dispute; (2) that it was owing to the default of defendant No. 1 herself that no written statement on her behalf was filed in Court; (3) that no objection was taken at the time to the plaintiff's witnesses being examined and cross-examined in the absence of the record of the case; and (4) that defendant No. 1's Pleader, on the 12th October 1909, expressly stated that he had closed his case and made no reservation with regard to the evidence of Ghulam Kadir. As a matter of fact, Mr. Balwant Rai was unable to point out how the defendant had been materially prejudiced in any of these respects. He also contended that another grievance of which his client complained was that the District Judge had refused to send for certain records which she wished to bring to his notice, but here again he had to admit that these records were entirely irrelevant to the present case and could not have thrown any light upon the dispute between the parties.

Mr. Balwant Rai's main contentions were—(a) that Mussammat Bhamphul Devi was "a representative" of Dilawar Singh, the judgment-debtor, and that the present suit was accordingly

not entertainable in view of the provisions of section 47 of the Civil Procedure Code ; (2) that the gift to Mussammat Bhamphul was *bonâ fide* and valid as it was made before the property of Dilawar Singh was attached ; and (3) that there was no proof that Dilawar Singh continued to manage the property and to enjoy its profits. The last two questions are really one, as the point at issue is whether the gift was a *bonâ fide* transaction or not, and it was in order to show that that transaction was a mere sham, that plaintiffs gave evidence to the effect that Dilawar Singh continued to manage the property and to take its profits.

The first question, then, which we have to decide is whether upon the facts of the case, Mussammat Bhamphul as the donee of her husband's property, can be regarded as his "representative" within the meaning, and for, the purposes of section 47 of the Civil Procedure Code.

Now, it is not contested that the plaintiff's decree against Dilawar Singh was merely one for a sum of money and that no property belonging to the judgment-debtor was thereby charged. In these circumstances the decision of the High Court of Allahabad in *Madho Das v. Ranji Patak* (1) is directly in point and we have no hesitation in following it. In that case the learned Judges (Edge, C. J., Banerji, J.) held that a purchaser by private sale of immoveable property from judgment-debtor is not a representative of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code of 1882 (which corresponds with section 47 of the present Code) in cases where the decree against the judgment-debtor is a single money-decree and creates no charge upon specific property. In the course of their judgment the learned Judges remark :—

"It has been held, and we think rightly, by the High Court at Calcutta and the High Court at Bombay and by this Court that where the decree in execution is a decree for sale of hypothecated property a purchaser, who had purchased under a private sale from the judgment-debtor the property, or part of it, so decreed to be sold, was a representative within the meaning of section 244, and there was good reason for so holding, because the suit and the decree were based on the mortgage or hypothecation bond. The proceeding was really one *in rem qua* the property, and the person claiming title to the property, affected by those proceedings, would be a representative within the meaning of section 244.

“ In a suit for sale under the Transfer of Property Act, 1882 (Act No. IV of 1882), such a purchaser, if his purchase was made before the institution of the suit, and if the plaintiff in the suit had notice of the purchaser's interest, would, by reason of section 85 of that Act, be a necessary party to the suit. If the purchase was made after the suit was instituted, it was made *pendente lite*. In either case, if for no other reason, convenience suggests that such purchaser should be treated as a representative of the defendant mortgagor from whom he purchased the whole or part of the property, the sale of which was sought by the plaintiff in the suit. The same principle would, we consider, apply if the purchase was made before suit, and the plaintiff had before suit no notice of the purchaser's interest. In this case, however, the decree against Mahabir Prasad was not a decree based upon any document hypothecating any property : it was not a decree for sale : it was a simple money-decree, and the only connection between that decree and the defendant here is that the plaintiff sought in execution of that money-decree to bring to sale property purchased by the defendant here from the legal representative of the judgment-debtor. In our opinion it would be stretching section 244 too far to hold that the section included, in an application for execution of a simple money-decree, a person who had purchased from the judgment-debtor property against which the decree was sought to be executed, but which was not affected by the decree itself and would not be affected until an order for attachment or an order for sale in execution of the decree was made.”

Mr. Balwant Rai relies, in support of his contention to the contrary, upon the ruling of the F. B. of the High Court of the Calcutta in *Ishan Chunder Sirkar v. Beni Mulhub Sirkar* (1). But that case is clearly distinguishable upon the ground that the person who was then held to be a representative of the judgment-debtor within the meaning of section 244 of the Civil Procedure Code of 1882, was one who had purchased part of a property which was covered by a mortgage decree, such purchase being subsequent in date to the said decree. The F. B. cited with approval, but distinguished the ruling in *Narain Acharyee v. Gregory* (2), where it had been held that a person who bought certain property belonging to a judgment-debtor, after a decree passed against the latter, was not his representative, inasmuch as the purchased property was not covered by the decree. The other authorities cited by Mr. Balwant Rai are also distinguish-

(1) (1896) *I. L. R.* 24 Cal. 62 (F. B.).

(2) (1867) 8 W. R. 304.

able upon this ground—*Dwar Buksh Sirkar v. Fatik Jali* (1), *Akhoy Kumar Soor v. Bejoy Chand Mohatap* (2) and *Surendra Narain Singh v. Gopi Sundari Dasi* (3).

We hold accordingly that the present suit is not barred by section 47, Civil Procedure Code.

The next question is, whether the gift in favour of Mussamat Bhamphul was a genuine transaction which actually passed the ownership in the property to the donee, or a mere sham effected with the object of trying to save Dilawar Singh's estate from the clutches of his creditors.

The Divisional Judge, as already pointed out, found that there was no *bonâ fide* transfer, and after hearing arguments and a careful consideration of the evidence and the probabilities we are compelled to agree with his conclusions.

The grounds upon which we base our finding are as follows :—

(1) In the first place, it is admitted that Bakhtawar and Dilawar Singh were *heavily* involved in debt at the time when the "gifts" were made, and that plaintiffs had succeeded in obtaining a decree against them for over Rs. 5,000.

(2) In the second place, it is a curious coincidence that both brothers should on one and the same day decide to make over the *whole* of their respective properties, the one (Bakhtawar) to his minor sons, the other (Dilawar Singh) to his wife. Both deeds of gift were executed on the 6th August 1907 and at the same place.

(3) No reason has been assigned by defendants for Bakhtawar's sudden determination to denude himself of all his property in favour of his minor sons, but various explanations have from time to time been given to account for Dilawar Singh's action. The explanation given in the deed of gift is that "as the property has been covered with sand, its quality has deteriorated and its produce has decreased to a great extent" and "I have now made up my mind to seek employment, and while I am on service I cannot manage the land."

This explanation is singularly lame. If, as a fact, the property had become so unremunerative that Dilawar Singh felt compelled to seek a living by taking service, it would have been easy for him to constitute his wife his general agent and give her authority to look after his property in his absence. There was, in other words, no necessity for him to make a *gift* of the whole of his patrimony to his wife. But quite apart

(1) (1898) *I. L. R.* 26 Cal. 250.

(2) (1902) *I. L. R.* 29 Cal. 831.

(3) (1905) *I. L. R.* 32 Cal. 1031.

from that objection, the explanation is hopelessly untenable in view of the admitted fact that Dilawar Singh never made any attempt to get employment elsewhere.

It was early recognized that this explanation would fail to carry conviction and, accordingly, it was afterwards suggested that the reason why Dilawar Singh had made the gift was because there had been disagreements between himself and his wife owing to his having had something to do with another woman.

The suggestion is that in these circumstances the wife insisted upon a separation and due provision being made for her maintenance, with the result that the husband made her a gift of the whole of his property. We are of opinion that this later explanation is as unconvincing as the other, as we cannot believe that in such circumstances a husband (who was, upon this hypothesis, not upon the best of terms with his wife) would consent to hand over to her everything of which he was possessed and leave himself an absolute pauper. Seeing this difficulty, Mr. Balwant Rai asserted that Dilawar Singh had not included the whole of his property in the gift, but when challenged by the opposite side, he was unable to point to any property which was left to him after the gift. Dilawar Singh himself, when examined as a witness, was not asked whether he had any other property, and the whole tenour of his evidence is that he had not. He admits that he is now living with his step-mother who owns property of her own.

There is, thus, no reasonable explanation vouchsafed for Dilawar Singh's act of generosity other than that given by plaintiffs who contend that the so-called gift was a sham transaction intended to save the property from the just claims of the donor's creditors. The probabilities are all in favour of this view, and in addition we have the direct evidence of Shadi Ram (p. 17). This witness is *lambardar* of Rupar and was a school-fellow of Dilawar Singh. He deposes that Bakhtawar and Dilawar Singh requested him to attest the two deeds of gift, and that on his asking them why they were making these gifts, they candidly informed him that the transactions were not intended to be effective, and that the object was to save their respective properties. We see no reason to disbelieve this witness. He is a man of position and seemingly has no reason for giving false evidence against defendant. On the other hand, as an old friend of Dilawar Singh, he would be just the man whom the latter would be likely to appeal to at a crisis in his affairs.

(4) Finally, we are satisfied that though for outward show Mussammat Bhamphul's nephew, Kapur Singh (the son of Dilawar Singh's sister) is said to have acted as her agent in the

management of the property, the person who has in reality managed it has been Dilawar Singh. Kapur Singh was not called as a witness by defendant to corroborate defendant's story, while, on the other hand, plaintiff's witnesses, Pandit Didar Singh and Munni Lal, depose that Dilawar Singh has throughout been looking after the property. Pandit Didar Singh states that he knows that Dilawar Singh manages it because his (witness) father and uncle make all arrangements with him and pay him the rent due from them as tenants. Munni Lal swears that Dilawar Singh himself informed him that he was managing the property.

Defendant's two witnesses, Waryam Singh and Ibrahim, assert that Dilawar Singh has nothing to do with the property which is managed on behalf of Mussammat Bhamphul, by the said Waryam Singh and Kapura Singh. It is possible that these two latter persons are employed to keep up appearances and that they do occasionally purport to act as the lady's agents. But in view of all the circumstances and of the direct evidence on the record, we are satisfied that there was no actual gift by Dilawar Singh to Mussammat Bhamphul, and that the real owner of the property is the man who was (as he admits) hard pressed by his creditors when he made the gift. As he says, "the decree was probably under execution when the deed of "gift was executed in favour of his wife." The very fact that his brother (who was jointly liable under the said decree) decided on the self same day to make a gift of the whole of *his* property to his minor sons, is highly suggestive.

We find therefore with the Divisional Judge, that the so-called gift in favour of Mussammat Bhamphul was fictitious and that in point of fact the property is still in the ownership of Dilawar Singh, the judgment-debtor. We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 65.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

RAM CHAND AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

DEWAN CHAND—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1057 of 1909.

Will—by Hindu—bequest to one daughter with full ownership and after her death to another daughter—construction of—

Where a Hindu, who had two daughters, one Mussammat Durga Devi (a widow) and the other Mussammat Hukam Devi (married), left a will stating

that his collaterals were to have no share in his property which he bequeathed to his daughter Mussammat Durga Devi adding "*jaisa ab main malik hun, waisa hi bad mere marne ke Mussammat Durga Devi malik hogi. Agar Durga Devi mazkur faut ho jawegi to phir tamam jaidad ki malik aur kabiz Hukam Devi hogi.*"

Held, that reading the will as a whole and having regard to the wishes of the testator, as gathered from the general tenor of the document, the testator intended that Durga Devi should succeed in the first instance for her life in the event of her predeceasing her sister, and that she should have an absolute estate only if she survived her sister and that on her death in the lifetime of her sister Hukam Devi, the latter should succeed and have an absolute estate, the collaterals being entirely excluded.

Further appeal from the decree of W. A. LeRossignol, Esquire, I.C.S., Divisional Judge, Amritsar Division, dated the 9th July 1908.

Shadi Lal, Tirath Ram and Ichhar Chand, for appellants.

- Lajpat Rai, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—One Bissa Mal, Khatri, died on the 16th May 1907, leaving him surviving two daughters Mussammat Durga Devi (a widow) and Mussammat Hukam Devi, married to Babu Dewan Chand, plaintiff. It appears that Bissa Mal's wife died of plague on the 11th May, and that on that date he and Mussammat Durga Devi were also suffering from it. He therefore thought it admissable on the said date to make a will regarding the disposition of his property, which consisted of a certain house in Amritsar and some ornaments, all acquired by himself. In this will he, in two places, expressly stated that his collaterals were to have no share in the property and that they had no rights thereto, and he expressed his wish that the said property should in the first instance devolve on his daughter, Mussammat Durga Devi. The will then proceeds: "*jaisa ab main malik hun, waisa hi bad mere marne ke Mussammat Durga Devi malik hogi. Agar Durga Devi mazkur faut ho jawegi to phir tamam jaidad ki malik aur kabiz Hukam Devi hogi.*" Bissa Mal died on the 16th May and on the 18th May Mussammat Durga Devi also succumbed. Mussammat Hukam Devi contracted the disease and died on the 24th May 1907. Her husband, Babu Dewan Chand, now sues for possession of the said property on the ground that his late wife inherited it under the said will as an absolute owner on the death of her sister, Mussammat Durga Devi. Defendants who are the brothers of Bissa Mal, contested the claim on various grounds, but plaintiff's claim was decreed by both the Lower Courts.

5th Juny. 1912.

Defendants applied to this Court on the revision side and their petition was admitted as a further appeal (under section 70 (1) (b) of the Punjab Courts Act) upon "the question as to the proper construction of the will." This question has been argued at some length before us, and we are asked by Mr. Shadi Lal, for the appellants, to set aside the decrees of the lower Courts on the ground that under the terms of the will, an absolute estate was devised to Mussammat Durga Devi as regards the house and absolute ownership in respect of the ornaments was bequeathed to her. Mussammat Durga Devi admittedly survived the testator and the argument is that as she obtained a vested right in the said property, and as under the terms of the will she became absolute owner thereof, the will could not further operate and that, consequently, on her death, the succession to *her* property must be governed *ab intestato* by either Hindu Law or Customary Law (whichever is found to apply). In our opinion, this argument is fallacious and is based upon the erroneous assumption that Mussammat Durga Devi became, under the terms of the will, the absolute owner of the property, although she pre-deceased Mussammat Hukam Devi. We concede that the words "*jaisa ab main malik hun, waisa hi bad mere marne ke Mussammat Durga Devi malik hogi*," had they stood unqualified, would have conferred an absolute estate upon Mussammat Durga Devi. But it must be remembered that the testator was most anxious to make it clear that his collateral relations were to have nothing to do with his property; that he was, on the other hand, desirous of providing for his two daughters; and that his obvious intention was that provision should first be made for his widowed daughter, Mussammat Durga Devi, who had no one to look to for maintenance, and that in the event of her death, his property should go to his other daughter, Mussammat Hukam Devi, who had a husband living. In these circumstances and especially in view of the express provision in his will that, if Mussammat Durga Devi died (*agar Mussammat Durga Devi faut ho jaye-gi*)—by which expression he intended, we think, to indicate that if she died *before* her sister, Mussammat Hukam Devi,—the property was to devolve upon the latter, we are of opinion that his intention was to make provision for Mussammat Durga Devi in the first instance for life in the event of her pre-deceasing her sister, but that she was to have an absolute estate only if she survived her sister. Similarly, we think that the testator's intention was to confer an absolute estate upon Mussammat Hukam Devi in the event of her surviving Mussammat Durga Devi. The will must be read as a whole and in construing t

we must have regard to the wishes of the testator to be gathered from the general tenor of the document. He clearly did not wish his property to go to his collaterals and for this reason he tried to make due provision for one or other of his daughters becoming the absolute owner of the property. But that he did not intend to convey an absolute estate to Mussammat Durga Devi, unless she survived her sister, is, we think, abundantly clear from the provision that on her death the property was to devolve on Mussammat Hukam Devi (*cf.* as to this the decision of this Court in Civil Appeal 858 of 1905). As Mr. Shadi Lal very rightly points out, if the property had been devised in absolute ownership to Mussammat Durga Devi, the further provision that on her death it was to devolve upon her sister, would have been futile, and we do not feel justified in ignoring this provision simply because the testator in an earlier part of the will stated that after his death Mussammat Durga Devi was to be just as much an owner of the property as he was. A will is not to be construed with literal strictness and we are bound to look to all its provisions in order to see what the real intentions of the testator were.

In the present case it is clear that the testator intended his property to remain with his daughters and not to go to his collaterals; that he wished Mussammat Durga Devi to enjoy it in the first instance; that (as Mussammat Durga Devi was at the time suffering from plague) he thought it very probable that Mussammat Hukam Devi would survive her sister and that he therefore provided for her succession in the event of his foreboding being realized; and finally, that his aim and object was that the absolute owner of the property should be the daughter who survived the other. We hold, therefore, that the claim of the plaintiff has been rightly decreed by the lower Courts and we dismiss this appeal with costs.

Appeal dismissed.

No 66.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

KIMAN—(DEFENDANT)—APPELLANT

Versus

SULTANI MAL—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 308 of 1909.

Mortgage—where mortgagee is to redeem a previous mortgage, it must be done within a reasonable time—demand by mortgagor not necessary—acquiescence by mortgagor in delay.

In 1893 defendant mortgaged to plaintiff certain land, a portion of which was in possession of a previous mortgagee—part of the mortgage-money was

retained by plaintiff-mortgagee to pay off the previous mortgagee. The land mortgaged was to remain in possession of defendant-mortgagor and he was also to get possession of the land previously mortgaged after it had been redeemed. The mortgagor was to pay interest annually, and in default of payment the mortgagee was entitled to possession.

In 1907 plaintiff-mortgagee sued for possession alleging that defendant had failed to pay interest since 1904, in which year the plaintiff had redeemed the previous mortgage; defendant alleged that he had paid interest up to year of suit (which, however, he failed to prove).

Held, that under the correct construction of the Full Bench ruling, 59 P. R. 1907 (*Gokal Chand v. Rahman*) (1) the mortgage would have become extinct and unenforceable on account of the plaintiff's failure to redeem the previous mortgage within a "reasonable time" from the date of mortgage, even without any demand by the mortgagor, had not the latter acquiesced in the continued possession of the previous mortgagee by paying the interest regularly to the plaintiff up to 1904. The delay in redeeming the previous mortgage was apparently not considered unreasonable by the defendant-mortgagor, whose wishes and interests were an important factor in the matter.

Held also, that the plaintiff was entitled to a decree for possession *simpliciter*, the matter of the amount of the lien being left to be decided on redemption.

Further appeal from the order of H. A. Rose, Esquire, I.C.S., Divisional Judge, Ambala Division, dated the 10th December 1909.

A. L. Roy, for appellant.

Ganpat Rai, for respondent.

The judgment of the Court was delivered by—

31st Jan'y. 1912.

JOHNSTONE, J.—On 18th May 1891 one Ram Singh obtained a decree against the present defendant No. 1 and his deceased brother for possession of part of the land in suit, the mortgage lien being stated as Rs. 147-12-0 in all, and on 29th June 1891 he got possession by execution. Meantime on 25th June 1891, defendant No. 1 mortgaged that and other land to plaintiff for Rs. 350 *without possession*. Of this sum Rs. 147-12-0 was retained by plaintiff to be paid to Ram Singh, who on redemption would, of course, hand over the land with him (21 *bighas kham*) to defendant No. 1 to cultivate and enjoy; and the rest of the consideration passed in other ways. Two years passed without plaintiff's paying off Ram Singh, who naturally retained the land mortgaged to him; and then on 18th July 1893, defendant No. 1 again mortgaged the same land (now in suit) to plaintiff for Rs. 600, made up of Rs. 147-12-0 as before due to Ram Singh, Rs. 247 due on the earlier deed aforesaid, and other items. The essential conditions of both mortgage-deeds were the same—mortgagor to hold possession and pay interest at

Re. 1 *per cent. per mensem*, mortgagee to pay off Ram Singh and set free the land with him ; on default of payment of interest in any year mortgagee to be entitled to possession. It was not until 1904 that plaintiff paid off Ram Singh and so secured for defendant No. 1 possession of the whole land. Finally, in July 1907, plaintiff sued for possession, alleging that for six years from 1893 defendant No. 1 had paid interest Rs. 54 *per annum* upon an arrangement that, until Ram Singh was paid off, Rs. 18 should be remitted from the annual interest, and that thereafter he paid nothing and so made default.

Defendant No. 1, on the other hand, pleaded that the suit must fail because of the non-payment of Ram Singh's debt within a reasonable time, and further alleged that he had paid interest regularly in full (Rs. 72 *per annum*) to date of suit.

The first Court laid on plaintiff the burden of proving non-receipt of interest for the years 1899 to 1907 and of establishing title to possession, and also drew two issues as to limitation and as to whether *shamilat* was included in the mortgage or not. The last point was decided finally in favour of plaintiff and the question is now at rest ; and the question of limitation was also decided in favour of plaintiff. On the other two points that Court held that plaintiff had not proved non-receipt of interest, and that his suit must fail because of the neglect to pay off Ram Singh.

The suit being dismissed (without costs) plaintiff appealed, and the learned Divisional Judge remanded the case to the first Court for enquiry and report, first holding that " the suit for " possession as mortgagee appears to be liable to dismissal " because plaintiff had twice broken his engagement to pay off Ram Singh, and then going on to enquire into how much was due to plaintiff " in order to settle the dispute between the " parties once and for all." It was on this point that remand was made.

We need not, as we shall see later on, go into the details of this further enquiry. On the Divisional Judge's finding that the suit must fail, the discussion of how much was due was quite uncalled for ; but we may mention that the first Court reported that *plaintiff owed the defendant No. 1* Rs. 211, and that the latter should be compensated to this extent.

When the Divisional Judge, however, again took up the case, its complexion entirely changed. He reconsidered his finding aforesaid against plaintiff on the case as a whole, referred to 59 *P. R.* 1907 (*F. B.*) (*Gokal Chand v. Rahman*) (1) as

authority for holding that, because it was not proved that defendant No. 1 had made any actual demand upon plaintiff to pay off Ram Singh, "the lien was not destroyed," and ruled that defendant No. 1 acquiesced in the arrangement under which Ram Singh was not paid off but a reduction of interest was allowed; and finally gave a decree for possession in lieu of Rs. 600 principal *plus* Rs. 216, being the interest on that sum from 1904 to date of suit at Rs. 72 *per annum*. Against this defendant No. 1 Kiman has appealed and we have heard arguments and have examined the records.

Appellant's case now is—

- (a) that passing of Rs. 600 consideration has not been proved;
- (b) that the mortgage was never complete because plaintiff failed to pay off Ram Singh till 1904;
- (c) the suit is barred as having been brought more than 12 years after date of mortgage;
- (d) that the interest allowed is wrong.

The first and third points can be disposed of in a few words. The deed was registered and passing of consideration was admitted at registration. The *onus* of proving non-receipt of the money was therefore on appellant, who has really made no attempt to discharge it. Then no question of limitation arises, plaintiff alleging payment of modified interest for six years, up to 1899, and defendant-appellant stoutly asserting payment of full interest up to year of suit. As regards (d) we do not think we need discuss the amount due on the footing of the mortgage. If plaintiff is to have possession, it is sufficient for the purposes of this case that he should have a decree for possession as mortgagee *simpliciter*, the matter of the amount of the lien being left to be decided upon redemption. Had the learned Divisional Judge taken this, to our minds, the correct view, much time and expense would have been saved to the parties and much trouble to the Courts.

There remains, then, only the question whether the mortgage was, at date of institution of suit, in effectual existence, for plaintiff's cross-objections are concerned only with their question of amount claimable by him and with the additional question of costs, which is after all only incidental.

Our final opinion is that plaintiff must have his decree, but we are far from agreeing with the Lower Appellate Court in its interpretation of the Full Bench ruling in 1907. We need not labour the point. In that case apparently demand had been made by the mortgagor upon the mortgagee that latter should redeem from the previous mortgagee and the demand had not

been met ; but in the judgment of Reid, J., in which alone is any mention made of demand, there is no indication that he considered that absence of such demand would prevent a defaulting mortgagee from losing the benefit of his mortgage. Not only is there in his discussion of the case no *dictum* to this effect, but further, in the rulings quoted by him as being, taken together, authority for his views, we can find no such *dictum* and indeed not even mention of the subject. When we also see that the other two Judges on the Full Bench say nothing about such demand, and when we consider that plaintiff-respondent's counsel is unable to cite a single authority in support of the idea that such demand by mortgagor is indispensable in order to destroy the mortgage, the true interpretation of Reid, J.'s *dictum* is abundantly clear.

This, however, does not conclude the case. Mr. Ganpat Rai for plaintiff-respondent, very forcibly argues that it is too late for defendant-appellant in this case to fall back upon the Full Bench ruling. Defendant-appellant pleaded that he did pay the interest regularly up to date of suit, thus acquiescing in the continued possession by Ram Singh of a portion of the land. Plaintiff-respondent alleged payment only of Rs. 54 *per annum* for six years upon a special agreement. Defendant-appellant has no doubt not *proved* any payments beyond what plaintiff-respondent admits ; but even so the former can hardly be heard to say that soon after 1893, when a " reasonable time " had elapsed, the mortgage, never complete, became extinct and unenforceable. Defendant-appellant says he went on paying full interest until 1904 and even until 1907, thus treating the contract as still an enforceable one ; how can he say now that before 1904 " reasonable time " had expired ? In deciding what is " reasonable time " the wishes and interests of the mortgagor are an important factor—in most cases the decisive factor ; and defendant-respondent acted as if in his opinion the delay in paying off Ram Singh was not unreasonable, and so made plaintiff-respondent understand that he did not intend to raise any objection on this score.

For these reasons we accept this appeal but only to this extent that we make the decree one for possession as mortgagee without any attempt to specify what sum is due to plaintiff-respondent. In all the circumstances we think the parties should bear their own costs, as much of the litigation and trouble and expense of the case has been due to the manner in which the Lower Appellate Court has dealt with it, rather than to the fault of either party.

Appeal accepted.

No. 67.

Before Hon. Mr. Justice Johnstone and Hon. Mr. Justice Rattigan.

MEGHA RAM—(DEFENDANT)—APPELLANT

Versus

MAKHAN LAL (PLAINTIFF) AND TWO OTHERS—
(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 532 of 1910.

Pre-emption—mortgage—pre-emptor not debarred from shewing that it is a sale—Indian Evidence Act, 1 of 1872, section 92—Punjab Pre-emption Act, II of 1905, section 4—effect of sale by pre-emptor (after obtaining decree but before decision on final appeal) of the property in respect of which his right arose.

Plaintiff sued for pre-emption in respect of an alienation of a building-site in Chiniot, which purported to be a mortgage with possession for 15 years, but which, plaintiff alleged, was in reality a sale. Under the terms of the deed the mortgagee, a nephew of the mortgagor, was to be at liberty to construct buildings—the cost of which was to form an additional charge on the mortgaged property and the amount was to be repaid on redemption together with interest at Rs. 6 *per cent. per annum*. No interest was chargeable on the mortgage money (Rs. 1,900), the mortgagee taking the income of the mortgaged property in lieu thereof.

Held, that plaintiff, not being a party to the deed, was not debarred under section 92, Indian Evidence Act, from shewing that the transaction was in reality a sale and not a mortgage, and that section 4 of the Punjab Pre-emption Act expressly allowed him to do so.

117 P. R. 1890 (F. B.) (*Tara Chand v. Baldeo*) (1) and 20 P. R. 1899 (*Parma Nand v. Airapat Ram*) (2), referred to.

Held also, that the fact that the pre-emptor had, after the Lower Appellate Court had confirmed the decree passed in his favour by the first Court, sold the property in respect of which his right of pre-emption arose, did not entitle the other side to have the decree set aside, in further appeal to the Chief Court, on the ground that the pre-emptor had lost all rights to pre-emption before the case was finally decided.

91 P. R. 1909 (F. B.) (*Dhanna Singh v. Gurbakhsh Singh*) (3), referred to.

Held further, that plaintiff, on whom the *onus* rested, had failed to prove that the transfer was a sale and not a mortgage.

100 P. R. 1895 (F. B.) (*Jagdish v. Man Singh*) (4), 78 P. R. 1904 (*Muhamad Umar v. Kirpal Singh*) (5), 19 P. R. 1905 (*Bishen Singh v. Mussammatt Pare*) (6), 145 P. R. 1906 (*Anwar Hasan v. Umatul Karim*) (7) and 20 P. R. 1899 (*Parma Nand v. Airapat Ram*) (2), referred to.

(1) 117 P. R. 1890 (F. B.).

(2) 20 P. R. 1899.

(3) 91 P. R. 1909 (F. B.).

(4) 100 P. R. 1895 (F. B.).

(5) 78 P. R. 1904.

(6) 19 P. R. 1905.

(7) 145 P. R. 1906.

Further appeal from the decree of S. S. Harris, Esquire, Divisional Judge, Shahpur Division, dated the 2nd March 1910.

Beechey, for appellant.

Nanak Chand, for respondents.

The judgment of the Court was delivered by—

JOHNSTONE, J.—This is a pre-emption suit. Megha Ram, 2nd Feby. 1912. defendant No. 1, if we look only at the deed upon which he relies which is dated the 9th October 1907, took a certain site in Chiniot town from defendant No. 2 in mortgage for Rs. 1,900. The plaintiff's case, however, is that he (plaintiff) owns the adjoining house, and that the mortgage was really a sale, disguised in the form of a mortgage, in order to defeat pre-emptors. The plaintiff offered Rs. 400 as the real price and as the market value. The issues were:—Was the alienation a sale or a mortgage?; (2) was the whole Rs. 1,900 paid in good faith?; and (3) if not, what is the market value of the property? The first Court, after consulting rulings and after considering all the circumstances of the case, came to the conclusion that the transaction was a mortgage as stated in the deed. That Court rightly laid upon the plaintiff the burden of proving that the real transaction was something different from what appears on the face of the deed. The alienation was found not to be a sale and so the suit for pre-emption was dismissed. The first Court went on to hold that Rs. 1,900 were actually paid.

The plaintiff thereupon appealed, and the learned Divisional Judge came to an opposite conclusion. He remarked upon the near relationship of the parties, the mortgagee being the nephew of the mortgagor's husband, and he also expressed the opinion that the sum paid, *i.e.*, Rs. 1,900, was very much higher than any mortgagee would give for possession of such property for 15 years. He further read the evidence of one Hira Nand, Pleader, as proving that the parties to the transaction actually said that it was their "intention to sell the land but to conceal the fact "of sale by an ostensible mortgage so as to defeat the rights of "pre-emptors." Thereupon, without going into the question of the sum actually paid or the market value, he gave the plaintiff a decree for possession on payment of Rs. 1,900. We understand that the plaintiff has paid this money without demur.

The alienee has now come up to this Court on further appeal. He argues on the basis of the authority of rulings of this Court that there was no sufficient reason for holding this transaction to have been a sale and we have heard arguments and have also carefully gone through the record.

One objection raised by the appellant by a petition put in on 20th January 1912, *i.e.*, after the filing of the appeal, we may dispose of at once. It is to the effect that plaintiff based his suit on his possession of one-fourth share of a house adjoining the house in dispute, that the plaintiff on the 12th October 1911 transferred that share to his mother by deed of gift, and that therefore the plaintiff has lost his *locus standi* to sue for pre-emption or to resist this appeal, and that his suit should be dismissed on this ground. In our opinion this contention cannot succeed, because plaintiff's decree awarded to him by the Divisional Judge bears date 2nd March 1910 while his parting with the aforesaid one-fourth share of the adjoining house took place long afterwards. No doubt, according to the authorities, a pre-emptor can only succeed if he has a right of pre-emption at the date of the sale and at the date of the institution of suit

* 91 P. R. 1909 (F. B.) and up to the passing of a decree in his
(*Dhanna Singh v. Gurbakhsh Singh*) (1). favour ;* but in the present case plaintiff

had his rights intact through the whole of these periods. No doubt in a sense the case is still *sub judice*, until the final appeal in this Court has been decided ; but it is not *sub judice* in the sense in which the defendants use the phrase, nor do we think it is open to the alienee, against whom a decree for pre-emption has been passed, to ask this Court to set aside the decree of the Lower Appellate Court on the ground that, after the plaintiff had secured the decree, he had parted with the property on the strength of which he was able to sue for pre-emption. Plaintiff is not asking this Court for anything : defendant No. 1 cannot ask this Court to take away from plaintiff what the latter has obtained, on the ground that the latter could not get it *now* if he was still asking for it.

But on the merits this appeal must nevertheless succeed. It is no doubt idle for Mr. Beechey on behalf of defendant-appellant to urge that section 92, Indian Evidence Act, is a bar to any attempt on the part of plaintiff to show that the mortgage-deed is not a mortgage-deed in reality, for the contention is at once met by a reference to section 4 of the Punjab Pre-emption Act ; and even apart from that provision of statute law

† Cf. 117 P. R. 1890 (F. B.)
(*Tara Chand v. Baldeo*) (2) and
20 P. R. 1899 (*Parma Nand v.*
Airapat Ram) (3).

we think the better view is† that the prohibition in section 92 aforesaid against going behind a written deed applies only to the parties to the deed and not to outsiders. It is obvious, however, that we need not discuss this matter further, for section 4 of the Pre-emption

(1) 91 P. R. 1909 (F. B.),

(2) 117 P. R. 1890 (F. B.).

(3) 20 P. R. 1899.

Act is clear. Finding against Mr. Beechey's client on this minor point we turn to the merits, that is to say, the question of the real meaning of the deed, a question to be answered in each case on a consideration of its own facts.

The site is situate in the town of Chiniot, which is now in the heart of a flourishing agricultural canal colony, and it may be safely assumed that such property will in the future rather increase than decrease in value. Plaintiff first valued the property at Rs. 400, but he is content now before us to take the value as Rs. 1,050 as estimated by the Local Commissioner, and he has paid Rs. 1,900 without objection. Then there is certain evidence on the record which would pitch the value at Rs. 2,000 to Rs. 2,500. In these circumstances we cannot agree with the Lower Appellate Court that Rs. 1,900 was an absurdly high figure for a mortgage loan. It is not redeemable for 15 years from date of mortgage, by which time the property even merely as a site, may not improbably be worth much more than Rs. 2,000 and so be well worth redemption.

The next point taken against appellant is that the near relationship between mortgagor and mortgagee points to the probability of collusion between them. No doubt collusion may be more likely between near relations than between strangers, but this does not carry the matter very far: what has to be shown is (a) that there was a positive understanding between mortgagor and mortgagee that redemption would never be demanded, or (b) that the terms of the mortgage are such that redemption is a virtual impossibility. So far we have found no facts establishing any such propositions as these.

Next, as to the statement of Hira Nand, Pleader, and its effect, which has been strangely magnified by the learned Divisional Judge. It is unlikely that persons concocting a plot would give themselves away to Hira Nand, so that anything in his statement which looks like confession of an intended fraud should be discounted; and further his statement is not incompatible with the idea that the parties to the transaction intended a mortgage, but, being apprehensive lest pre-emptors should attempt to persuade the Courts that it was a sale, went to the pleader for legal advice as to the mode of drafting best calculated to prevent their real intentions from being misunderstood.

Again, it is urged that the condition under which the mortgagee was to be at liberty to build on the site at will—" *nau tamir har kism* " and charge his expenditure, with 6 per cent. *per annum* interest on the house, is incompatible with anything but a permanent alienation; but this argument is far from

convincing. The mortgagee is, so far as we know, a man of ordinary means, and there is no need to credit him with any grandiose intentions in the way of bricks and mortar. In his own interests, even as purchaser, he would build merely one ordinary house, or a set of ordinary shops; and at the end of 15 years such structures might be well worth redeeming on payment of principal and interest. It is important to note that no interest was chargeable on the mortgage money proper.

Virtually the above is all that can be said for plaintiff's case, and we do not think the circumstances, on which stress is laid, prove either that appellant and his vendor had a positive understanding that redemption was not to be demanded or that the conditions of the mortgage are such as to make redemption a practical impossibility. The owner or her heir, as she is very old, will have the legal right to redeem in 1922, and we think it not impossible that it may be worth his or her while to redeem then.

In our opinion these views are in accordance with authority. It is unnecessary to discuss at length all the rulings that have been brought to our notice, as circumstances and facts vary greatly from case to case; but we may point to the decision of the F. B. in 100 P. R. 1895 (*Jagdish v. Man Singh*) (1), which was in some respects a much stronger case for the plaintiff than is the present one, and yet in it the learned Judges declined to hold that the mortgage deed then in question was other than it purported to be; to 78 P. R. 1904 (*Mussammatt Umar v. Kirpal Singh*) (2) and 19 P. R. 1905 (*Bishen Singh v. Mussammatt Paro*) (3) from which the principle may be drawn that onerous conditions in a mortgage are not in themselves sufficient to warrant the decision that it was really a sale. The cases relied upon by Mr. Nanak Chand for plaintiff are 145 P. R. 1906 (*Anwar Hasan v. Umatul Karim*) (4), Civil Appeal No. 872 of 1901, and 20 P. R. 1899 (*Parma Nand v. Airapat Ram*) (5), in which ostensible mortgages were held to be sales, but in them we can find no clear *dicta* exactly covering the present case. They are distinguishable, by virtue of the facts in them being different, the first of the three being peculiarly distinguishable in this way.

For these reasons we accept this appeal, and, setting aside the decree of the Lower Appellate Court, we restore that of the first Court and dismiss plaintiff's suit with costs.

Appeal accepted.

(1) 100 P. R. 1895 (F. B.).

(2) 78 P. R. 1904.

(3) 19 P. R. 1905.

(4) 145 P. R. 1906.

(5) 20 P. R. 1899.

No. 68.

Before Hon. Mr. Justice Rattigan.

HABIB KHAN AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

MUHAMMAD AND OTHERS—(PLAINTIFFS)—ALLAHYAR
AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 84 of 1912.

Custom—alienation—by female in possession—assented to by father of plaintiff, who sues for a declaration that it shall not affect his reversionary rights.

Held, that the assent of plaintiff's father to the alienation by a female in possession, if made *bonâ fide*, without collusion or intention to injure the reversioners, is binding upon the plaintiff in a suit for a declaration that the alienation shall not affect his reversionary rights.

7 P. R. 1905 (*Labhu v. Mussammat Nihali*) (1), referred to.

Further appeal from the decree of C. L. Dandas, Esquire, Divisional Judge of Rawalpindi Division, dated the 21st February 1911.

Shah Nawaz, for appellants.

Devi Dyal, for respondents.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—This petition for revision was admitted on 3rd Feby. 1912. the question “whether a man is bound by the consent given by “his father to an alienation by a female in possession, provided “such consent was not collusive?” The facts, so far as they are material, are as follows :—

On the 9th August 1900, Mussammat Mughlani sold one-third, and her daughter-in-law Mussammat Gullan sold two-thirds of a joint holding to one Bhagwan Das for Rs. 160 and Rs. 300, respectively, mutation of names in favour of Bhagwan Das took place in December 1900, and it is an admitted fact that at the time of mutation certain of the nearest reversioners, including Nur Muhammad, father of the present plaintiffs, (who alone are interested in the case in this Court), were present, and expressly stated that they agreed to the alienations. In January 1901 Bhagwan Das sold the said property to Allah Yar, defendant, (who is also one of the nearest reversioners), and Habib, defendant, who is a reversioner rather more remotely connected.

The sole question is, whether the sons of Nur Muhammad are bound by the assent of their father given at the time of mutation.

The Munsif held that they were not so bound, because Nur Muhammad is not shewn to have received any consideration for so consenting.

The learned Divisional Judge admits that they would probably be bound by his assent to a gift or his validation of an alienation given in good faith and with due regard to the necessities of the alienor and the rights of his own sons, but he holds that in this case "they are not bound by his bare acquiescence which is rather in the nature of a personal estoppel than an acquiescence binding under Customary Law."

It is somewhat difficult to understand what the learned Divisional Judge means by this observation. The question in all such cases is simple. Was the consent of the father given *bonâ fide*, and was it in the circumstances reasonably so given? The very fact that no less than 5 of the next reversioners expressly consented to the alienations and appeared at mutation in support of those alienations strongly supports the contention that the action of the reversioners was *bonâ fide*, and this is especially the case when we find that three at least of the assenting reversioners had sons of their own whose interests they were not likely to wish to injure. It is, I think, a legitimate presumption from the facts that the consent was given, because the reversioners were satisfied that the alienations were valid and proper according to the Customary Law which governs them, (see 7 P. R. 1905 (*Labhu v. Mussamat Nihali*) (1)). There is also this fact to be borne in mind that Nur Muhammad himself did not attempt to challenge the alienation during his life-time and that it was not until some 10 years after the date of the original sales, that any suit was brought to contest them. It is also somewhat significant that the plaintiffs themselves have in the meantime been purchasing other pieces of land from the same two ladies. Owing to the lapse of time, the alienees have naturally some difficulty now in proving by clear and cogent evidence full necessity in respect of the sales by the widows, but their difficulty in adducing such evidence is mainly due to the inaction on the part of the reversioners to challenge those sales for so long a period.

Taking all the facts into consideration I am satisfied that the action of Nur Muhammad and the other reversioners at the

mutation proceedings was *bonâ fide* and that there was no collusion or intention to injure the reversioners or any other circumstance invalidating the consent then given. I therefore accept this and the connected petition (Civil Appeal No. 85 of 1912) and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

No. 69.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

NAWAB AND OTHERS—(PLAINTIFFS)—PETITIONERS

Versus

DUNI CHAND—(DEFENDANT)—RESPONDENT.

Civil Revision No. 2197 of 1911.

Revision of order directing plaintiffs to make up deficiency in Court-fees—Civil Procedure Code, Act V of 1908, section 2 and order VII, rule 11—decree.

Held, that an order directing a plaintiff to make up a deficiency in Court-fee by a certain date is not open to revision by the Chief Court.

82 P. R. 1911 (*Mir Umar Ali v. Mussammat Nasib-un-Nissa*) (1), followed.

146 P. R. 1908 (*Siri Dhar v. Amar Nath*) (2), distinguished.

Petition for revision of the order of Lala Radha Kishen, Subordinate Judge, Lahore, dated 22nd August 1911.

Fazl Hussain, for petitioners.

Shadi Lal and Sukh Dial, for respondent.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—This is an application for revision 19th Feby. 1912.
section 70 (1) (a) of the Courts' Act of an order returning a
plaint for the deficiency of the Court-fee to be made up.

A preliminary objection that an order rejecting the plaint for failure to make up the deficiency is appealable as a decree, that the point now taken can be decided on that appeal and that an application for revision consequently does not lie, has force. Order VII, rule 11 of the Code of Civil Procedure provides for the rejection of a plaint when the relief sought is undervalued and the plaintiff fails to correct the valuation within the time fixed by the Court.

Section 2 of the Code includes the rejection of a plaint in the definition of a decree. Had the petitioner not come up to this Court on revision and had the record remained in the Court

below that Court would presumably have rejected the plaint, and the petitioner could have appealed and included in his memorandum of appeal the plea now taken. In 82 P. R. 1911 (*Mir Umar Ali v. Mussammat Nasib-un-Nissa*) (1), this Court held that it must decline to interfere in revision with orders which could be attacked in an appeal from the decree in the suit, and distinguished 146 P. R. 1908 (*Siri Dhar v. Amar Nath*) (2), now cited for the petitioner, on the ground that that ruling dealt, as it did deal, with a question of jurisdiction, a Munsif having held that the property in suit before him was assessable for purposes of jurisdiction as a garden while the District Judge held that it was agricultural land assessable at 30 years' Government revenue. The distinction is clear and 146 P. R. 1908 (*Siri Dhar v. Amar Nath*) (2), consequently does not help the petitioner. The question of sufficiency of Court-fee can obviously be decided on appeal from the rejection of the plaint and, following 82 P. R. 1911 (*Mir Umar Ali v. Mussammat Nasib-un-Nissa*) (1), to which I was a party, I reject the application for revision with costs.

Revision rejected.

No. 70.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Kensington.

MUSSAMMAT BHAG BHARI—(DEFENDANT)—APPELLANT
Versus

WAZIR KHAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 498 of 1909.

Custom—widow's right to have joint holding partitioned—Punjab Land Revenue Act, XVII of 1887, section 111—Baloches of Mozang near Lahore.

Held, that a widow of a deceased co-sharer in a joint holding has a statutory right to demand partition and, although a suit for a declaration that she is not so entitled, is competent in a Civil Court (*vide* 82 P. R. 1898 (F. B.) (*Buta v. Mussammat Jivani*) (3), the plaintiff can only succeed, by proving a custom by which widows are restrained from claiming partition and no consideration of desirability or undesirability should have any weight with the Court.

Held also, that the plaintiff in the present case had failed to prove such a custom among Baloches of Mauza Mozang near Lahore.

5 P. R. 1868 (*Talewind Khan v. Mussammat Khanzadee*) (4), 93 P. R. 1869 (*Attar Singh v. Mussammat Partapee*) (5), 28 P. R. 1870 (*Kahn Singh v. Mussammat Prem Kour*) (6), 22 P. R. 1878 (*Ranjha v. Mussammat Rajji*) (7) and 65 P. R. 1881 (*Mussammat Mansoman v. Abdul Kadir Khan*) (8), referred to.

(1) 82 P. R. 1911.
(2) 146 P. R. 1908.
(3) 82 P. R. 1898 (F. B.).
(4) 5 P. R. 1868.

(5) 93 P. R. 1869.
(6) 28 P. R. 1870.
(7) 22 P. R. 1878.
(8) 65 P. R. 1881.

Further appeal from the decree of Captain A. A. Irvine, Additional Divisional Judge, Lahore Division, dated 25th February 1909.

Pestonji Dadabhai and Sangam Lal, for appellant.

Moti Lal, for respondent.

The judgment of the Court was delivered by—

ROBERTSON, J.—This case is a very simple one. The 21st Feby. 1912.
defendant-appellant Mussammat Bhag Bhari is the widow of one Muhammad Khan, caste Baloch, of Mozang, a village near Lahore. The plaintiff-respondent is Wazir Khan, son of Ahmad Khan, who owned a joint holding with Muhammad Khan.

The widow applied for partition to the Revenue Authorities and an order was passed by Lala Moti Ram on the 10th September 1906 granting the claim and in that order it was noted quite correctly that under the Land Revenue Act, sections 3 and 111, a widow holding a life estate has a perfect right to apply for partition. It further appears that in this case when the question of granting the *muafi* of this land was under consideration after the death of Muhammad Khan, the Commissioner on the 26th July 1899, passed an order to the effect that the *muafi* would be made over in its entirety to Ahmad Khan on condition that the woman would be allowed complete control over her own share of her husband's land. The woman alleges that she is not allowed any such control, nor indeed is she allowed the full produce of her share, and it is perfectly clear that the defendant usurps the entire management of the land, that there is only one tenant for the entire holding and that the woman does not in fact receive her full share.

The defence that she seeks partition only for the purpose of facilitating alienation does not appear to us to be sound. If she really were, as alleged by the defendant, in full control of her own share this could not make any difference. Partition having been granted by the Revenue Authorities, Wazir Khan has come to the Civil Court with his suit for a declaration that Muhammad Khan's widow is not entitled to claim partition. It cannot be denied that under the Full Bench ruling of this Court, 82 P. R. 1898 (*Buta v. Mussammat Jivani*) (1), this suit is competent. It may be urged with much force that the Land Revenue Act having given a widow a right to apply for partition and having provided for discretion in the matter on the part of the Revenue Authorities, the jurisdiction of Civil Courts over

(1) 82 P. R. 1898.

the question is entirely ousted. But in face of 82 *P. R.* 1898 (*Buta v. Mussammat Jiwani*) (1), it is not open to counsel for the appellant to put this forward so long as that judgment remains upon the record for our guidance. Accepting therefore that the suit lies, we have to consider how it is to be treated.

Now it appears to us that the assumption that on all occasions it is undesirable to grant partition to a widow is one which cannot be sustained in view of the well-known capacity of the women of the agricultural classes in the Central Punjab to manage the cultivation of their lands. No doubt there is a long series of judgments of this Court in which decrees have been passed restraining widows from obtaining partition; but most of these as Nos. 5 *P. R.* 1868 (*Talewind Khan v. Mussammat Khanzadee*) (2), 93 *P. R.* 1869 (*Attar Singh v. Mussammat Purtapee*) (3), 28 *P. R.* 1870 (*Kahn Singh v. Mussammat Prem Kour*) (4), 22 *P. R.* 1878 (*Ranjha v. Mussammat Rajji*) (5) and 65 *P. R.* 1881 (*Mussammat Mansoman v. Abdul Kadir Khan*) (6) were delivered before the passing of the Land Revenue Act which is now in force. We think that the view taken by the officer who compiled the Customary Law of the Ambala District is worth quoting in this connection and it runs as follows:—

“ All tribes agree that a widow without male issue can claim partition as a matter of right, although she holds a life interest only. The Jats of Naraingarh add that this is only admissible where she is unable to obtain maintenance from her husband's heirs, but this should be taken as a mere expression of opinion as to the custom they would like to enforce. It is clearly recognised all through the District that the widow is within her rights in demanding separation of her husband's share. The claim is usually contested by the heirs on the ground that the widow will only waste the property when she obtains absolute control. The objection is not always groundless, but, if it was not for her ability to enforce her rights in case of necessity, the widow would often fare badly at the hands of the relatives. The fear of driving her to extremities on the one side, and her own knowledge that she has everything to gain by keeping on good terms with the heirs on the other side, act together in enabling the two parties to avoid the perpetual disputes, which are so liable to arise from the conditions imposed by the widow's life interest. The question has some importance and the unani-

(1) 82 *P. R.* 1898.(2) 5 *P. R.* 1868.(3) 93 *P. R.* 1869.(4) 28 *P. R.* 1870.(5) 22 *P. R.* 1878.(6) 65 *P. R.* 1881.

“mity with which the tribes admit the widow’s right to partition
“deserves special notice. It is not uncommon for revenue
“officials in the lower grades to assume that the widow’s claim
“should be rejected on the ground that women are not qualified
“to manage their land themselves. In the case of the better
“cultivating castes, the Jats, Sainis, Rains, Kambohs, and some
“others, the assumption is as untrue as it is opposed to the
“entire feeling of the people, evidenced by their replies to this
“question. In the case of those castes, where the women are
“unable to go into the fields themselves, it is only reasonable
“to scrutinise the claim more rigorously and to refuse to award
“partition unless where it can be shewn that the claim is made
“*bonâ fide* and subject to proper arrangements for the manage-
“ment of the holding.”

These words were written some years ago by one of the Judges of this Bench, Kensington, J., and they adequately express the views of this Bench. We are quite clear that, although it is open to a co-sharer to bring a suit in a Civil Court to prove that by custom a widow is restrained from obtaining partition of the joint holding in which she is a co-sharer for life, the burden of proving the existence of such custom clearly lies upon him. A widow has a clear, unequivocal, statutory right in virtue of her possession under the Land Revenue Act to demand partition. That Act provides many safe guards against the improper grant of such a request and where the Revenue Authorities see fit to grant it, and a suit is brought in a Civil Court to restrain such grant, we are quite clear that no considerations of desirability or undesirability should have any weight at all in this Court ; and that the question to be considered is the simple one, whether or not the plaintiff has succeeded in proving the existence of this power of restraint under the Customary Law. In this case the evidence to prove such custom is very weak and we cannot hold the existence of such a custom to be proved. We therefore see no reason for interfering with the exercise of her right to claim partition by the widow, subject to the orders of the Revenue Authorities. The appeal is accordingly accepted and the suit dismissed with costs throughout.

Appeal accepted.

No. 71.

Before Hon. Mr. Justice Johnstone.

THAKAR DAS—(PLAINTIFF)—APPELLANT

Versus

KAHNA AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 532 of 1911.

Custom—Pre-emption—in town of Banga—Punjab Pre-emption Act, II of 1905, section 13.

Held, that it has been proved that the custom of pre-emption prevails in the town of Banga and that section 13 of the Punjab Pre-emption Act is therefore applicable to plaintiff's suit for pre-emption of a shop on the ground of vicinage.

Further appeal from the decree of L. H. Leslie Jones, Esquire, Divisional Judge, Jullundur Division, dated the 22nd December 1910.

Rambhaji Datta, for appellant.

Kamal-ud-Din, for respondents.

The judgment of the learned Judge was as follows :—

21st Feby. 1912.

JOHNSTONE, J.—In this case both the Lower Courts have decided that Banga, being a town in the Jullundur District, no custom of pre-emption exists in it and therefore plaintiff's suit for pre-emption of a shop on the ground of vicinage must fail.

The plaintiff comes up to this Court on revision and his petition has been admitted as a further appeal under section 70 (1) (b), Punjab Courts Act. I have now seen the record and have heard arguments. Eight documentary precedents must be looked at in deciding the question whether pre-emption prevails in Banga or not. I have carefully examined these precedents which are all judicial decisions.

In the first of them, which relates to the year 1873, a claim for pre-emption was admitted, and the same occurred in the third case of the year 1891 and the fourth case of the year 1892. These cases so far as they go tend to show that the custom of pre-emption was recognised.

In the second of the cases (of the year 1887) the suit was brought on the score of relationship. The claim was contested, but ultimately it was decreed.

In the fifth case (of 1899) it is finally decided by the Divisional Judge, Mr. Kensington (now Mr. Justice Kensington) that Banga was not a town at all but a village. Being a village, of course, there was under the old law a presumption that the custom of pre-emption did prevail, but no presumption that pre-emption by *vicinage* prevails, and the learned Divisional

Judge was of opinion that no custom of pre-emption *by vicinage* was proved.

In the next case (of 1903) in which Major Beadon, Divisional Judge, dissented from Mr. Kensington's view that Banga was a village and not a town, I think that Major Beadon was right. In that case it was ruled that the custom of pre-emption on the ground of vicinage was not proved. But the learned Judge by no means held that there was *no* custom of pre-emption in the town.

In the seventh case (also of 1903) the District Judge found the custom of pre-emption on the ground of relationship proved but not on the ground of vicinage.

As regards the last case (of 1908), decided by Mr. Waring, the Divisional Judge, the case was really decided on another point altogether. The judgment, however, ended up with a paragraph in which Major Beadon's views as given above were endorsed.

It seems to me quite clear from all this that a custom of pre-emption does exist in this town. No doubt it has not been proved that the custom exists in *bazar* Nawan, in which the shop is situated; but there is no reason whatever to suppose that *bazar* Nawan is a "sub-division" of the town. There is absolutely no proof that it is so, in the proper sense of the word, and the name suggests that it is simply a small street of shops built subsequently to the rest of the town. Such a street can hardly be called a sub-division.

Further Mr. Kensington in his judgment referred to above says on his knowledge of the town of Banga that it is absurd to talk of "Sub-divisions" in such a small place.

The net result is that the custom of pre-emption does prevail in this town, and that therefore plaintiff can claim pre-emption under section 13 of the Pre-emption Act. Mr. Kamal-ud-Din for the respondent admits that under that section plaintiff's claim is superior to defendant's, and I therefore hold that this is so.

There remains only the question of how much plaintiff should be made to pay. This point has not been decided by the learned Divisional Judge. I therefore accept the appeal, decide that the plaintiff has a right of pre-emption superior to that of the vendee, and set aside the judgment and decree of the Lower Appellate Court and remand the case under order XLI, rule 23, Civil Procedure Code, for retrial of the case on the remaining issues.

Stamp to be refunded; other costs to be costs in the cause.

Case remanded.

No. 72.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

FAIẖA—(DEFENDANT)—APPELLANT

Versus

ATA MAHOMED—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 47 of 1911.

Custom—succession to ancestral property gifted to a daughter—husband or collateral—Mahomedan Jats, Nawashahar Tahsil, Jullundur District.

Held, the parties being Mahomedan Jats of Nawashahar Tahsil, Jullundur District, that a resident son-in-law had no right to succeed to ancestral property gifted to a daughter (his wife) on the latter's death, in the absence of proof of the existence, in the tribe concerned, of a custom allowing the appointment of a *khana-damad*, and that consequently the plaintiff, a nephew of the deceased donor, was entitled to succeed in preference to the son-in-law.

134 P. R. 1894 (*Mahla v. Shah Muhammad*) (1), and 50 P. R. 1893 (*F. B.*) (*Ralla v. Budha*) (2), referred to.

Further appeal from the decree of Lieut.-Col. G. C. Beadon, Divisional Judge, Ambala Division, dated the 1st May 1911.

Muhammad Iqbal, for appellant.

Sheo Narain, for respondent.

The judgment of the learned Chief Judge was as follows :—

29th Feby. 1912.

SIR ARTHUR REID, C. J.—The question for decision is whether the son-in-law excludes the son of the brother of the last male owner. The parties are Mahomedan Jats of the Nawashahar Tahsil of the Jullundur District.

The facts found by the Lower Appellate Court are that the last male owner made a gift of ancestral land to his daughter, and that on the daughter's death he allowed her husband to take possession. On his death his nephew sued the son-in-law for possession of the land. The Lower Appellate Court decreed the suit, holding that, even if the plaintiff consented to a gift to the daughter and her descendants, it did not follow that he consented to a gift to a daughter's husband, and that when a gift to a son-in-law was allowed by custom, it was only valid in so far as it was for the benefit of the daughter and her children.

For the appellant the last paragraph of the judgment of Benton, J. in 134 P. R. 1894 (*Mahla v. Shah Muhammad*) (1), is cited. It was held therein that the *khana-damad's* rights were the same, however he might have been appointed, whether by gift to himself or by gift to his wife or by the express wishes of the father-in-law that he should succeed, and that the *khana-damad* was entitled to hold for life, the condition of residence

having in all cases to be fulfilled. The parties were Warachis (Mahomedans) of the Gujrat *Tahsil* and District. The same Judge held in 50 P. R. 1893 (F. B.) (*Ralla v. Budha*) (1) the parties being Mahomedan Arains of the Nawanshahr *Tahsil* of Jullundur, that there was no evidence that the practice of appointing a *khana-damad* prevailed and was sanctioned by custom in that locality; that the *Riwaj-i-am* was clearly opposed to its existence; that the practice did not prevail generally but was exceptional, and that it was incumbent upon those who relied upon it to establish its validity. No evidence on this record of the existence of the practice of *khana-damadi* has been cited. Reliance has merely been placed on various decisions on the subject of *khana-damadi* in other parts of the Province. A mere son-in-law is by no means necessarily a *khana-damad* and if he claims the rights of a *khana-damad*, he must establish that the parties to the suit are subject to a custom which confers those rights on a son-in-law.

For these reasons I dismiss this appeal with costs.

Appeal dismissed.

No. 73.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

GANPAT RAM AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

BAHARA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 508 of 1909.

Custom—Alienation—Muhammadan Sahu Jats, Mauza Chaupratha, Multan District—unrestricted power of alienation in presence of a son—Riwaj-i-am.

Held, that it had been proved that, by custom among Muhammadan Sahu Jats of Mauza Chaupratha in the Multan District, a proprietor has full power of alienation irrespective of any question of necessity and that his action cannot be challenged by his son.

107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*) (2) and 73 P. R. 1895 (F. B.) (*Ramji Lal v. Tej Ram*) (3), referred to.

Further appeal from the decree of T. P. Ellis, Esquire, Additional Divisional Judge, Multan, dated 10th February 1909.

Shadi Lal, for appellants.

Badar-ud-din, for respondents.

(1) 50 P. R. 1893 (F. B.).

(2) 107 P. R. 1887 (F. B.).

(3) 73 P. R. 1895 (F. B.).

The judgment of the Court was delivered by—

28th Feby. 1912.

RATTIGAN, J.—Plaintiff, Bahara, prays for a declaration that the sale by his father in 1900, of a one-third share in a certain well, situate in *manza* Chaupratha in the Multan District, will not affect his reversionary rights after the death of his father. The plaintiff is one of the sons of the vendor and he and his family are *Sahu* Muhammadan Jats of the said village. The vendees pleaded that the sale was valid, (1) because it had been effected for consideration and necessity; and (2) because the vendor had an unrestricted power of alienation.

The first Court granted plaintiff the decree for which he prayed. The Divisional Judge on defendant's appeal held that, out of the total consideration of Rs. 1,500, the sum of Rs. 1,252 had been proved to have been paid and to be for necessary purposes. He accordingly so far accepted the appeal "as to" modify the decree to a declaration that plaintiff will be entitled "when the succession opens out, to succeed to the estate" "on the payment of Rs. 1,252."

Both Courts held that the *onus* of proving that the vendor, Amir, had an unrestricted right of alienation rested upon the defendants and that they had failed to discharge the burden.

From the decree of the Divisional Judge both parties have preferred further appeals to this Court and the first question which has been argued before us is, whether the vendor had a right to alienate the land (which was admittedly ancestral) apart from any question of necessity. After hearing arguments on this point we are satisfied that defendant's contention is sound and that plaintiff's suit must be dismissed on this ground.

Unquestionably, the burden of proving a right of this exceptional nature rested originally upon the defendants who asserted it, (See No. 107 P. R. 1887 (F. B.) (*Gujar v. Sham Das*) (1), and No. 73 P. R. 1895 (F. B.) (*Ramji Lal v. Tej Ram*) (2). But as was pointed out in both those cases, this initial presumption can be rebutted by evidence in the case, and such evidence may consist of instances given in evidence in support of the alleged right, of entries in the *Wajib-ul-arz* or in the *Riwaj-i-am* and the like. The plaintiff in the present case belongs to the *Sahu* (Muhammadan) Jat tribe of the Multan District and it is in evidence that in the village in question this is the only *Sahu* Jat family, the other proprietors belonging to other tribes and the majority being (apparently) *Aroras*. The very well, which is now the subject matter of dispute, is mainly owned by *Aroras*. It is also proved that there have been very

many alienations of property in the village by various members of the plaintiff's family and others and in no single instance has any such alienation been contested by the next heirs. We can hardly believe that all these alienations would have been allowed to pass unchallenged, if the powers of alienation, possessed by the alienors, had been of the usual circumscribed character.

Bearing these facts in mind, we find on a reference to the Customary Law of the Multan District, that in that district far more plenary powers of disposition are accorded to Muhammadan proprietors than are recognised elsewhere. This *Rivaj-i am*, it must be remembered, was prepared by a Settlement Officer of great repute, Mr. (afterwards Sir Charles) Roe and that (as the volume itself testifies) the answers given by the tribes were opposed to the strong personal views which that officer, even, then, held as to the general prevalence of the agnatic theory. "I am," he says, "by no means prepared to assert that a custom can be proved in favour of all the very wide powers of gift asserted in the above answers, but I certainly think that this power is far more extensive here than in most other parts of the Punjab. This I attribute to two causes:—

"*Firstly*.—The proximity of the district to the frontier, and the existence of a dynasty of Pathan Nawabs down to 1818 has kept custom much more in accordance with Muhammadan Law."

"*Secondly*.—The fact that nearly all the villages are held on possession, that except in some parts near the rivers, true village communities are at most unknown; that the well is the true unit of proprietary right, and that property generally has been acquired comparatively recently; all this tends to weaken the idea that a man holds his land merely on a life interest in an entail and strengthen the idea that his holding is really his own property to do what he likes with.

"It may perhaps be doubted if there is a custom in the strictly legal sense of the word on any of the points contained in the answers, but as remarked by the Financial Commissioner they at any rate show the existing state of feeling from which customs may be expected to grow, and I think that this feeling is generally that, whilst the exclusion of sons from ancestral lands or a gift to a rank outsider would be looked upon with great disfavour, other gifts within the limits of Muhammadan Law would not be objected to. At any rate I do not think they should be summarily set aside on the ground that they are contrary either to local custom or to the custom of the Punjab."

In No. 51 *P. R.* 1910, a single Bench of this Court found that among Muhammadan *Sahu* Jats of a village in the neighbouring Montgomery District, a proprietor had an unrestricted power of alienation, and the conditions found to exist in that village exist also in the village with which we are concerned. It is also a significant fact that in no reported, or, so far as we knew unreported, case has this Court found that the restrictions upon alienations of ancestral property, which obtain so largely throughout this Province, apply to proprietors in the Multan District.

In the circumstances and without laying down any rule applicable to *Sahu* Jats generally in the Multan District, we are satisfied that Amir had a right, irrespective of any question of necessity, to sell the property and that his action cannot be challenged by his son. In the face of the entries in the *Riwaj-i-am*, the *onus probandi* was shifted to plaintiff and he has failed to discharge it, while the large number of alienations that have occurred, and have passed uncontested afford corroboration of the correctness of the said entries.

We accordingly accept this appeal, and dismiss plaintiff's suit with costs throughout.

" *Appeal accepted.*

No. 74.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

MUSSAMMAT CHAMPO—(DEFENDANT)—APPELLANT

Versus

SHANKAR DAS AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 485 of 1910.

Transfer of Property Act, section 53—principles of, applicable in Punjab—gift to wife on account of natural love and affection, not for consideration—inference from fact that the alienation has in fact defeated and delayed creditors—suit should be on behalf of all creditors.

Held, that the provisions of section 53 of the Transfer of Property Act, being in accordance with general principles of justice, equity and good conscience, should be taken as a guide by the Courts of this Province.

6 *P. R.* 1901 (*Lakshmi Narain v. Tara Singh*) (1), followed.

Held also, that a gift of property to a wife "on account of natural love and affection" is not a transfer "for consideration" within the purview of the section.

Held also, that a gratuitous transfer, which does in fact defeat or delay the creditors of the transferer, gives rise to the inference that it was the intention of the transferer to defraud his creditors—and it will then be incumbent on the alienee to show that at the time the transfer was made, the transferer had undisposed assets, sufficient to discharge his debts.

Burjorji Dorabji v. Dhunbai (1), and *Chidambara Pothan v. Poongarunam* (2), referred to.

Held further, that a suit to set aside a fraudulent transfer should be brought by, or on behalf of, all the creditors of the transferer.

Burjorji Dorabji v. Dhunbai (1), and *Hakim Lal v. Mooshakar Sahu* (3), referred to.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi Division, dated the 11th April 1910.

Shadi Lal, for appellant

Dwarka Dass, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—On the 20th March 1907 and again on the 5th March 1912. 22nd April 1907, one Sohan Lal executed a *Hundi*, on each occasion for Rs. 600 in favour of Shankar Dass, plaintiff. These *Hundis* were payable 61 days after execution.

On the 17th April 1907, Sohan Lal by deed, which in terms purports to be one of gift and was registered on the 23rd April 1907, settled two houses on his wife Mussammat Champo.

On the 11th January 1908 Shankar Das sued to recover the money due on the said *Hundis*, together with interest from Sohan Lal. In that suit Sohan Lal did not appear as a contesting party and an *ex parte* decree was passed against him. Later on he was called as a witness on behalf of the plaintiff and in such capacity, he admitted the claim and stated that while he had no desire to attack the *ex parte* decree against himself, his contention was that one Chhote Missar, a co-defendant in the case, was a partner in the transaction and liable to pay his share of the debt. The District Judge held that the only person liable on the *Hundi* was Sohan Lal and on the 2nd March 1908, a decree for the full amount with subsequent interest at the rate of Rs. 6 per cent. until realisation was passed against the latter.

Early in 1909 Shankar Das in execution of his decree attached the said two houses, whereupon Mussammat Champo objected that the houses were her property in virtue of the deed of gift in her favour and as a result the objections were allowed and the attachment was removed.

(1) (1891) *I. L. R.* 16 *Bom.* 1, (pp. 14 and 19-21). (2) (1909) 2 *Indian Cases*, 813. (3) (1907) *I. L. R.* 34 *Cal.* 999 (p. 1006).

On the 13th August 1909 Shankar Das instituted the present suit and in his plaint he alleges that the real owner of the houses is his judgment-debtor Sohan Lal and that the latter and Mussammat Champo have colluded to defeat his just claims.

Some little time before the institution of this suit Sohan Lal had petitioned under the provisions of Act III of 1907, to be declared an insolvent and his petition was accepted by the order of the District Judge, dated the 18th August 1909.

The sole question that arises in the present suit is whether the transfer of the two houses by Sohan Lal to his wife, Mussammat Champo, is effective as against the claims of the decree-holder, the present plaintiff.

In answer to the plaintiff's claim Mussammat Champo's first contention was, that she was a transferee in good faith and for consideration, inasmuch as the transfer to her had been made in discharge of a debt due to her from her husband. As to this both the Subordinate Judge and the Divisional Judge are agreed that she has not proved the existence of any such debt and with this finding we have no hesitation in concurring. There is no evidence, worthy of the name, in support of the allegation and the deed itself, by its very terms, shows conclusively that it was intended as a purely voluntary gift on the part of the husband to his wife.

For the purposes of this case we must, therefore, take it that the transfer was made by Sohan Lal to his wife from motives of affection, and that the question which we have to decide is whether in the circumstances a gift of this kind falls within the purview of the principles of law, enunciated in section 53 of the Transfer of Property Act 1882. That Act does not in terms extend to this Province but as laid down in No. 6 P. R. 1901 (*Lakshmi Narain v. Tara Singh*) (1), the provisions of section 53 are in accordance with general principles of justice, equity and good conscience and as such should be taken as a guide by the Courts of this Province. We entirely agree with this view of the law. The provisions of section 53 of the said Act are as follows:—

“ Every transfer of immoveable property, made with intent
“ to defraud prior or subsequent transferees thereof for con-
“ sideration or co-owners or other persons having an interest
“ in such property, or to defeat or delay the creditors of the

“transferrer, is voidable at the option of any person so defeated
“or delayed.

“Where the effect of any transfer of immoveable property
“is to defraud, defeat or delay any such person and such transfer
“is made gratuitously or for a grossly inadequate consideration
“the transfer may be presumed to have been made with such
“intent as aforesaid.

“Nothing contained in this section shall impair the rights
“of any transferee in good faith and for consideration.”

Obviously the first question before us is whether this transfer to Mussammat Champto was gratuitous. Mr. Shadi Lal contends that it was not, inasmuch as it was made from motives of love and affection and in support of his contention he relies upon the provisions of section 25 (i) of the Indian Contract Act, 1872. That section provides that “an agreement made without consideration is void” and it then proceeds to enumerate certain agreements which, though made without consideration (as defined in section 2 (d) of the Act) are not void and in this category it places an agreement expressed in writing and registered under the law for the time being in force for the registration of documents and made on account of natural love and affection between parties standing in a near relation to each other. Mr. Shadi Lal contends that a transfer of property made on account of natural love and affection between such parties must, therefore, be held to be a transfer for consideration and as such not within the purview of section 53, paragraph 2 of the Transfer of Property Act. We are unable to accept this contention. All that the Indian Contract Act in section 25 provides is that transactions of the kind therein specified are not void and it certainly does not enact that such transaction must be deemed to be for consideration. On the contrary, from the very fact that such transactions are made *exceptions* to the rule that *agreements made without consideration* are void the only inference that can legitimately be drawn is that such transactions are in law made without consideration and would be *void* but for the saving clause. We cannot agree that because a transfer of property may not be void by reason of the provisions of section 25 (1) of the Contract Act, it is therefore to be deemed to be a non-gratuitous transfer for the purposes of section 53 of the Transfer of Property Act. In the present case the deed of transfer is described as a *hiba-nama* and in it the transferrer distinctly and in express terms states that he is making the transfer of his own free will and as a gift. In England

it is a well recognized principle that while a settlement made before, and in consideration of marriage, is a settlement for valuable consideration, a post-nuptial settlement is voluntary and in the nature of a gift, pure and simple, though no doubt in Courts of equity post-nuptial settlements (which are otherwise unimpeachable) will be supported on very slight valuable consideration.

We must hold, therefore, that the transfer in this case was, as indeed it expressly purports to be, purely gratuitous.

The next question is, whether the effect of the transfer has been to defraud, defeat or delay the plaintiff, who was at the time a creditor of the transferrer? If such has been the effect of the transfer, the Court may presume that the *intent* of the transferrer was to defraud his creditor.

Now what are the facts upon which the plaintiff relies? He points out in the first place that the transferrer was indebted to him prior to the date of the transfer. In the second place, he urges that the transfer was gratuitous and in the third place he points out that the transferrer has not been able to pay the debt due to him and has in fact been obliged to seek the help of the Insolvency Courts. In these circumstances we think it was incumbent on the defendant to show that, at the time the transfer was made, the transferrer had undisposed assets sufficient to discharge his debts and that in default of such proof, the Court may legitimately assume that the transfer of a valuable part of his property by the transferrer has in fact defeated or delayed the creditor, and as a further consequence, that the intention of the transferrer was to defraud such creditor (see *Burjorji Dorabji v. Dhunbai* (1), and *Chidambaram Pothan v. Poongavanam* (2)). Section 36 of the Provincial Insolvency Act, 1907, is not here applicable, inasmuch as the transferrer was not adjudged insolvent within 2 years after the date of the transfer, but this does not affect the general principle of law as enunciated in section 53 of the Transfer of Property Act. In the present case defendant has made no attempt to prove that at the date of the transfer, the transferrer had, after making the gift, assets sufficient to pay all his debts. Sohan Lal (who was called as a witness by plaintiff) does, no doubt, say that after the gift he paid certain debts and that "there was no loss" when the gift was made. But from the mere fact that he satisfied *some* of his creditors, it does not follow that he was in a position to satisfy *all* his creditors

(1) (1891) *L. L. R.* 16 *Bom.* 1 (p. 14).

(2) (1909) 2 *Indian Cases*, 813.

and his statement that there was no loss is vague, and clearly does not amount to a definite statement that he was able to pay his debts, irrespectively of the property he transferred.

We must accordingly hold that the transfer was voidable at the instance of Sohan Lal's creditors. But it does not necessarily follow that a suit such as the present is maintainable at the instance of one only of such creditors. On the contrary, there is ample authority to the effect that the suit is one which should be brought by, or on behalf of, all the creditors of the transferor, (see *Burjorji Dorabji v. Dhunbai* (1), *Hakim Lal v. Mooshahar Sahu*) (2). It is not open to one of the body of creditors to sue for a declaration, such as that here sought, that the property is liable to be sold in execution of his particular decree, and *à fortiori* this is the case, when the suit is instituted after Insolvency Proceedings under Act III of 1907 have commenced. This objection, however, was not taken in the Courts below or in the grounds of appeal to this Court and it was only hinted at by Mr. Shadi Lal in the course of his arguments at the hearing. Mr. Dwarka Das, who apparently realized that some such argument might be urged in support of the appeal, informed us that all Sohan Lal's creditors were acting together and that he was in fact appearing on their general behalf, though nominally his power-of-attorney was from the respondent, Shankar Das, alone. In these circumstances, we cannot, upon this objection, direct the dismissal of the suit, but we obviously cannot so entirely ignore the insolvency proceedings as to grant plaintiff the declaration in the terms asked for. We are justified, in declaring that the transfer of the property in suit in favour of Mussammat Champo cannot affect the rights of Sohan Lal's creditors to proceed against that property in satisfaction of their respective claims, but we cannot declare that it is liable to be sold in execution of the decree in favour of plaintiff. Sohan Lal having been adjudged an insolvent and the whole of his property having under the order of the District Judge vested in the receiver thereby appointed, this property must in view of our findings be regarded as part of the insolvent's assets which are available for rateable distribution among the debtor's creditors as a body.

We accordingly so far accept this appeal as to direct that a decree be passed in favour of plaintiff to the effect that the transfer of the 2 houses in suit shall not affect the rights

(1) (1891) *I. L. R.* 16 *Bom.* 1 (pp. 19—21). (2) (1907) *I. L. R.* 34 *Cal.* 999 (p. 1006).

of Sohan Lal's creditors to treat the said property as still belonging to Sohan Lal, or the right of the said receiver to realize and distribute the same rateably among such creditors.

In the circumstances of the case and seeing that plaintiff had no right to bring this suit in his own name, we leave the parties to bear their own costs in this Court.

Appeal accepted.

No. 75.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

BADAR BAKHSH AND OTHERS—(PLAINTIFFS)—
PETITIONERS

Versus

MUSSAMMAT SAHIB JAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 1882 of 1910.

Custom—Alienation—powers of collaterals to challenge alienation, not affected by alienor being a convert to Christianity.

Held, that among Muhammadan Rajputs of the Jullundur District the customary powers of collaterals to challenge an alienation are not affected or destroyed simply by the conversion of the alienor to Christianity.

36 P. R. 1909 (*Mukerji v. Alfred*) (1) distinguished.

Petition under section 70 (1) (b) of Act XVIII of 1884 for revision of the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated 14th March 1910.

Kanwar Narain and Shiv Narain, for petitioners.

Pestonji Dadabhoy, for respondents.

The order referring the case to a Division Bench was as follows :—

29th March 1911.

RATTIGAN, J.—One Sube Khan, a Rajput (Muhammadan) agriculturist of *manza* Bhura, in the Nawashahr *Tahsil* of the Jullundur District, was in possession (apparently as an ordinary agricultural proprietor) of certain lands in that village. These lands were admittedly “ancestral property” in the sense that that expression is understood in the so-called Customary Law of this Province.

Sube Khan was converted to Christianity and after his conversion made a will, whereby he devised this ancestral immoveable property to his daughters and their issue.

Plaintiffs, who are in actual possession of the said property and are admittedly the agnatic heirs of the deceased, sue for a declaration that Sube Khan's will is invalid against them, inasmuch as, according to the custom of the parties, Sube Khan was incompetent to alienate his ancestral property in favour of his daughters and to the prejudice of his *nephews*. The Sub-Judge, 2nd class, and the Divisional Judge have both decided against plaintiffs' claim and have based their decision on the ruling of this Court, reported as No. 36 P. R. 1909 (*Mukerji v. Alfred*) (1). Plaintiffs apply for revision of the decree passed against them.

The case is a singular one and, so far as I know, the question now before me has never been directly adjudicated upon by this Court. My own view (as at present advised) is that the Lower Courts have erred in dismissing the suit, as I fail to see how the mere fact that the person, who for the time being happens to be the life owner (with very restricted rights of alienation), renounces his religion and his personal law can have the effect of enlarging his powers of dealing with property in which, under customary law, his reversioners have rights of their own. In saying this, I assume for present purposes that these Rajput agriculturists observe the rules ordinarily obtaining among such persons, and it is upon this assumption that I venture to think that the decisions of the Lower Courts are erroneous. The case upon which they rely is clearly distinguishable, inasmuch as in it the property in suit was the *acquired* property, in a town, of a man, who had been converted to Christianity from Hinduism.

In the present case, we are, *ex-hypothesi*, dealing with an ordinary agriculturist in possession, in the usual way, of ancestral property. It may be that Sube Khan had by custom the right to dispose of his property as he did, or it may be that Sube Khan's family in such matters is not bound by customary rules. These are questions which may hereafter have to be considered and the effect of his conversion with reference to other states of fact is not at present before me. I am dealing with the case simply upon *à priori* grounds, just as the Courts below have done. They are of opinion that No. 36 P. R. 1909 (*Mukerji v. Alfred*) (1) governs this case and that the conversion of an agriculturist Muhammadan to Christianity enables him to devise his ancestral property to his daughter. *Primâ facie*, he would have had no such power of devise, had he not changed his religion, and the question is, whether by so changing his religion, he is enabled to deal with ancestral property in a manner entirely opposed to

the ordinary rules of Punjab Customary Law. To my mind, there can be but one answer to this question and that in the negative. A person of this class, who is in possession for the time being of ancestral property has very limited rights in respect of its disposition and his reversioners have also rights of a very real nature with regard to it. In this connection, I might refer to the decision of the Full Bench in No. 18 P. R. 1908 (*Sadhu Singh v. Secretary of State*) (1).

To hold that such a person can, by renouncing his religion, enlarge his powers of dealing with property which is only in a very restricted sense, *his* property, is, in my opinion, opposed to the primary principles of custom as observed by agricultural tribes in this Province. As however, the question is novel and of great importance, I think it should be determined by a Division Bench and I refer it accordingly.

The judgment of the Division Bench was delivered by—

5th March 1912.

RATTIGAN, J.—The facts so far as they are at present material are set forth in the order of reference and we need not repeat them. Upon the question referred to us, we have no hesitation in agreeing with the opinion expressed in the referring order and in holding that the conversion of Sube Khan to Christianity did not affect the right of his reversionary heirs, under customary law, to challenge his disposition of ancestral property. This right of the reversioners is derived, independently of Sube Khan, from the common ancestor, and no unilateral act on the part of the latter can possibly destroy it though of course it may be, that for other reasons the present alienation is binding on the reversioners. That is a matter upon which no decision has yet been given by the Lower Courts. The actual question before us is fully discussed in the order of the Single Bench and it is sufficient for our purposes to say that we entirely agree with the views there expressed.

The authority upon which the Lower Courts have acted (No. 36 P. R. 1909 (*Mukerji v. Alfred*) (2), is, as remarked in the referring order, obviously not in point. We accordingly accept this petition for revision and reversing the decrees of the Lower Courts, we remand the case under order XLI, rule 23, Civil Procedure Code to the Court of the Subordinate Judge for determination of the second and only remaining issue. In this connection we may add that we advisedly refused to add an issue as to the consequences of alleged adverse possession on the part of Sube Khan. No such plea was advanced in either of the

(1) 18 P. R. 1908 (F. B.).

(2) 36 P. R. 1909.

Courts below and it owes its existence now solely to the ingenuity of the learned advocate who appears for the respondents. In our opinion the rights of the parties must be determined upon the pleadings upon the record and the issues framed by the Sub-Judge.

Case remanded.

No. 76.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

MUSSAMMAT CHANDI—(DEFENDANT)—APPELLANT

Versus

THULLA SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 250 of 1910.

Succession to land granted to a person and his al aulad—meaning of word al aulad—includes daughter.

Held, that the word *al aulad* means offspring of any kind and that therefore a daughter is entitled to succeed to land granted to her father and his *al aulad*.

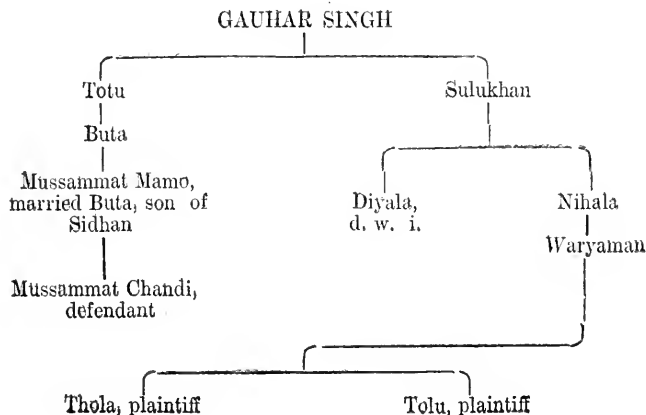
Further appeal from the decree of T. P. Ellis, Esquire, Divisional Judge, Ludhiana, dated 8th February 1910.

Dwarka Das for appellant.

Muhammad Iqbal for respondents.

The judgment of the Court was delivered by—

ROBERTSON, J.—The facts in this case are given fully 6th March 1912. in the judgments of the lower Courts and need not be repeated at great length here. The following pedigree table shews the relationship of the parties :—



It appears that after the death of Buta, Buta Singh who was married to Mussammat Mamo, daughter of Buta, was in possession of Buta's lands and appears to have claimed them partly on the ground of being Buta's *damad* and also on the ground that the lands had been mortgaged to him. Diyala and Nihala brought a claim against Buta Singh for the redemption of the land under mortgage. This claim was compromised and we are now simply concerned with the interpretation of the terms of the compromise. Under that agreement Diyala and Nihala received certain benefits in return for which they agreed that all the rest of the property should remain with Buta Singh, *damad* of Buta, subject only to the condition that it was not to be alienated. It was agreed that these lands should remain with the descendants of Buta Singh by his wife Mussammat Mamo so long as such descendants should remain. Mussammat Mamo and Buta Singh are both dead leaving Mussammat Chandi, the defendant, who has taken possession of the land and claims the right to it under the compromise as descendant of Buta Singh and Mussammat Mamo.

The lower Appellate Court has discussed the meaning of the terms used in the compromise as if the expression had been that the estate was to go to Buta and his *aulad* (اولاد) from generation to generation. The lower Appellate Court has however unfortunately omitted to notice that the expression used is not *aulad* (اولاد) but *al aulad* (اولاد آل). Whatever *aulad* might mean if used alone, there can be no doubt that *al aulad* means offspring of any kind. The meaning is thus given in Fallon's Hindustani Dictionary at page 120:—

A. *al, al aulad, n. f.* 1. Offspring; children; progeny; descendants. 2. Family; house; race; dynasty.

In the Original Arabic *al* signifies the issue born to the daughter, and *aulad* the issue of the son.

Al bel, al-o-atfal, n. f. Offspring; children; issue. *Al bel barhti rake*, Benediction. *Ala-i-Sultani n. m.*, dynasty; royal dynasty; royal family.

Similarly in Forbes' Dictionary at page 55 we have *Al, f.* children; progeny; descendants; offspring; race; dynasty.

N.B.—*Al* is commonly used to express a race or family by the mother's side; in contradistinction to *aulad*, a race, etc., by the father's side (Binning), etc.

We see no reason whatever to doubt that in using the term (أولاد) *al aulad* the intention was that so long as any descendants male or female of Buta Singh and Mussammat Mamo remained, the land should continue in their possession. After the failure of descendants of any kind, it should revert to the descendants of Nihala. The learned counsel for the respondent has in our opinion quite failed to show that (أولاد) *al aulad* could have any other interpretation and this view is supported by the judgment in 84 P. R. 1909 (*Gurdit Singh v. Mussammat Prem Kaur*) (1). We have therefore no hesitation in accepting the appeal and restoring the decree of the first Court as regards the land.

As regards the house property in respect of which there has been an appeal by the other side, we are quite clear that the decision of the learned Divisional Judge to the effect that the title of the descendants has clearly ripened by much more than twelve years' adverse possession is correct the predecessors in title of Mussammat Chandi have clearly been in possession as owners without contest since 1874.

We therefore accept the appeal of Mussammat Chandi as regards the occupancy land and reject that of the plaintiffs Dhola and Tolu as regards the houses. The result is that the plaintiff's claim is rejected with costs throughout.

Appeal accepted.

No. 77.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

BAWA RAM LAL—(PLAINTIFF)—APPELLANT

Versus

RAM KISHEN AND ANOTHER—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 628 of 1911.

Custom—Dadupanthi chelas—whether marriage causes forfeiture of the property given to chela for his maintenance—onus probandi.

Held, that plaintiff, on whom the *onus* was, had failed to prove that by custom a Dadupanthi *chela* in the Ferozepore District, who belonged to a shrine situate in the Hoshiarpur District, forfeits, by taking a wife, his rights to property given to him for his maintenance.

Further appeal from the decree of T. P. Ellis, Esquire, Additional Divisional Judge, Ferozepore Division at Ludhiana, dated 16th February 1910.

Madan Gopal for appellant.

Obedullah for respondents.

The judgment of the Court was delivered by—

7th March 1912.

RATTIGAN, J.—This case was admitted as a further appeal, under section 70 (1) (b) of the Punjab Courts Act, upon the question whether by custom a Dadupanthi *fakir* who abandons his fraternity does not thereby lose his rights as Dadupanthi (ground 8. Note of the grounds for revision). In point of fact, this ground *assumes* that the respondent has abandoned his fraternity. Whereas the evidence of Hira Das, the *mahant* of the shrine concerned, is to the effect that a Dadupanthi *chela* who marries does not thereby cut himself adrift from the sect, and there is no evidence worthy of the name to the contrary. In any event, the question in that form does not arise in this case. The only question before us is whether the plaintiff has proved that by custom a Dadupanthi *chela* forfeits all rights to property, to which he has succeeded or which has been given to him as such *chela*, by marrying a wife. The person who here contends that marriage has that effect is not the head of the shrine (Hira Das, *mahant*), who would ordinarily be the person to enforce the forfeiture of the kind, but a co-*chela*, the plaintiff Bawa Ram Lal, and it is *primâ facie* a strong point against plaintiff's contention that the said *mahant* gives evidence which, so far as it goes, is entirely in favour of the defendant. But apart from this fact, both the Courts below are agreed that plaintiff has failed to show that a Dadupanthi *chela*, by taking a wife, forfeits his right to property given him for maintenance, while on the other hand there is a mass of evidence in favour of the contrary contention. Mr. Madan Gopal was compelled to admit that upon the record as it stands his *chela's* case was hopeless, but he contended that the Courts had accepted, as decisive, evidence relating to the custom obtaining among Dadupanthi *fakirs* in the Ferozepore District (where, in point of fact, the property in dispute is situate, and where both plaintiff and defendant actually reside), and have not enquired into the custom of the shrine itself which is situate at *mauza* Hariana in the Hoshiarpur District. The learned pleader accordingly prayed for a remand for enquiry to be made as to such custom. We were unable to accede to this request for several reasons. In the first place, the parties had every opportunity to establish their respective cases in the Munsif's

Court and plaintiff adduced all the evidence that he thought would prove his case. He did not ask the Munsif to take evidence with regard to the custom obtaining at Haryana, nor in his grounds of appeal to the Divisional Judge did he ask specifically for such further enquiry. Even now Mr. Madan Gopal cannot point to any definite evidence which is likely to tell in his favour, and he has practically had to admit that what he wants is a "fishing enquiry." In the next place the *mahant* of the shrine at *mauza* Haryana has appeared as a witness in the case and has deposed to the effect that a *chela* by marriage does not leave the sect, thereby implying of course, that the *chela* does not by marriage lose his rights in the sect. In addition to this we have the evidence of another Haryana witness, Ram Das (called by plaintiff himself), who asserts that "hundreds of Dadupanthi *fakirs* have married wives and still "live in their *dehras*." This evidence comes from plaintiff's own witness and relates to the custom, not of Ferozepore, but of Hoshiarpur District. In our opinion, plaintiff has hopelessly failed to establish his contention and further, as the marriage of defendant took place many years before suit, the delay in instituting the present claim is in itself suggestive of plaintiff's knowledge of the weakness of his case.

Before concluding we might remark that the Divisional Judge is in error in supposing that Civil Appeal No. 1538 of 1881 (cited under paragraph 87 of the Digest of Customary Law) "is a clear authority for the proposition that among "Dadupanthis of the Ferozepore District forfeiture is not "involved when a *mahant* marries." This ruling is merely to the effect that the *chela* of a Dadupanthi is not entitled to succeed to his *spiritual* father's share in ancestral joint property in the presence of co-sharers (who were the deceased's own natural brothers), and there is nothing either in the ruling itself or in paragraph 87 of the Digest to support the proposition laid down by the Divisional Judge. This mistake, however, on the part of the Divisional Judge is not very material, as it is abundantly clear from the evidence on the record that defendant by his marriage did not forfeit his rights to the property in dispute. We accordingly dismiss this appeal with costs.

Appeal dismissed.

No. 78.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

BHAI GURDIT SINGH—(PLAINTIFF)—APPELLANT

Versus

SHER SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 795 of 1910.

Charitable bequest—trust to spend income on dharmarth—not enforceable—conduct of heir in joining in the trust as one of the trustees and allowing it to proceed for some years—estoppel.

One R. S. made a will by which he left certain property on trust to spend the income on *dharmarth* and appointed seven persons as trustees to administer the same, one of them being his heir. Shortly afterwards the testator died. He had during his life-time established a *langar* to supply food to the poor, and for some years after his death the trustees carried this on, until the heir prevented further funds being spent for the purpose. The surviving trustees thereupon brought the present suit against the heir under section 539, Civil Procedure Code, 1882.

Held, following *Runchardas v. Parvatibai* (1), that the bequest for such wide and vague purposes as distribution on *dharmarth* is void and the property designated for the purpose must be held to be undisposed of.

Held also, that the fact that the defendant accepted and joined in the trust and allowed it to proceed for six years did not estop him from denying its validity now.

Further appeal from the decree of Major A. A. Irvine, Divisional Judge, Lahore Division, dated 21st May 1910.

Shadi Lal and Santanam for appellant.

Petman and Gullu Ram for respondent.

The judgment of the Court was delivered by—

9th March 1912.

ROBERTSON, J.—The facts of this case are quite simple and are fully given in the judgments of the lower Courts.

The decision of the case depends upon the interpretation of a will, executed on the 21st October 1899 by one Sardar Rai Singh, and on a question of estoppel.

By one part of the will the testator left property of about the value of Rs. 44,000, as it turned out on realization, to be employed on "*dharmarth*." The exact words of the will are as follows :—

"Take member sahiban jis qadr amdani mublighat yane
"munafa mublighat ka howe, woh sab dharmarth me sarf karenge."

Translation.—So that these members shall apply all the income, *i.e.*, profits derived from the cash amount to *dharmarth*.

“*Jo makan almashhur Pir Siraji hai uska Kiraya jo ho woh membran sahiban dharmarth me surf karenge.*”

Translation.—The members named above shall apply the amount of rent derived from the house known as *Pir Siraji* to *dharmarth*.

We have heard long and learned arguments on the point, but all we need say is that it appears to us quite clear in face of the judgment of their Lordships of the Privy Council in *Runchardas v. Parvatibai* (1), that it is impossible for us to come to any other conclusion than that come to by the learned Divisional Judge on this point. There is no difference in this connection between the term “Dharm” which was that dealt with in the Privy Council judgment, and “*dharmarth*” which is the word used in the will before us. *Dharmarth* simply means according to Fallon’s Dictionary “a charitable grant, a “religious endowment” and this is too vague and indefinite an expression to form the subject of a trust or an administration by the Court. A bequest for “charity” in England which comes within the recognised technical meaning of “charity” is not void for vagueness, nor probably would a bequest in this country for any special charity, but we are bound to follow the view of the Privy Council that a bequest or trust for such wide and vague purposes as distribution on *dharmarth* is void, and the property designated for such purpose is undisposed of. Mr. Shadi Lal wanted to be allowed to give evidence that “*dharmarth*” in this case was intended to mean only the maintenance of a *langar* which had in fact been maintained by a trust for 5 or 6 years after Sardar Rai Singh’s death, but such evidence is clearly inadmissible and the evidence on the record in fact shews that the *langar* was only one, perhaps the principal, form of *dharmarth* which the testator had in his mind.

It is urged that Sher Singh having himself accepted and joined in the trust and allowed it to proceed for 6 years is estopped from denying its validity now. We can see no ground for this contention. All that can be said is that the *langar* has benefitted for six years gratuitously by Sher Singh’s action, whereas he might have put a stop to it at once, and it is difficult to conceive how such an action can amount to estoppel as regards the future. He is of course clearly estopped in respect of the trust as regards the past.

As regards costs. As we think the appellants have acted *bonâ fide*, and that the testator certainly intended to devote this money to some form of charity, we direct that the appellant's costs throughout be paid by the part of the estate now under contest.

Appeal rejected.

No. 79.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Scott-Smith.

ZAKA-UD-DIN—(DEFENDANT)—APPELLANT

Versus

**SIRAJ-UD-DIN AND OTHERS—(PLAINTIFFS)—AND
OTHERS—(DEFENDANTS)—RESPONDENTS.**

Civil Appeal No. 122 of 1911.

Custom—alienation—Quraishi Sheikhs of qasba Thoru, tahsil Nuh, Gurgaon District—Muhammadan Law—Riwaj-i-am.

Held, that Quraishi Sheikhs of *qasba* Thoru, *tahsil* Nuh, Gurgaon District, are governed by custom and not by their personal law, and that consequently a gift made by a widow in favour of one of the collaterals of her deceased husband, to the exclusion of the others, was invalid.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated the 3rd November 1910.

Fazl-i-Hussain for appellant.

Sukh Dial for respondents.

The judgment of the Court was delivered by—

12th March 1912.

SHAH DIN, J.—The facts are fully given in the judgments of the Courts below, which have both concurred in decreeing the suit of the plaintiffs-respondents for a declaration that the deed of gift dated the 21st February 1910 executed by Mussamat Zafr-un-Nisa, widow of Aziz-ud-din, in favour of Zaka-ud-din, son of Badr-ud-din, in respect of the whole landed property in her possession shall not affect their rights of reversion. The parties are Quraishi Sheikhs of *qasba* Thorn in *tahsil* Nuh of the Gurgaon District and their relationship appears from the pedigree-table attached as appendix A to the judgment of the Divisional Judge.

The sole question for decision in this appeal is whether the parties are governed by Muhammadan Law or by custom; and it is not disputed that if the rule of decision is furnished by custom, then the gift in dispute having been made by a widow in favour of one of the collaterals of her deceased husband to

the exclusion of others, was invalid. The counsel for the appellant has referred to four documents on the record marked as exhibits D-1, D-2, D-3 and D-4 in support of his argument that at one time the parties' family followed Muhammadan Law and not custom, and that therefore the *onus* lay on the plaintiffs of proving that they were not governed by their personal law and that the power of alienation was restricted. All that is proved by the said documents is that the property left by Qazi Hisam-ud-din, father of Madar Din (see the pedigree-table), was divided between his two sons and one daughter according to Muhammadan Law as far back as 1812 A. D. This, however, does not very much help the appellant's case, inasmuch as we find that, with the exception of this one instance in which the rule of inheritance laid down by Muhammadan Law appears to have been observed, whenever succession opened out in the family in subsequent years that rule was departed from. In other words, daughters were excluded from inheritance by the sons, and in the event of a male proprietor dying sonless, his widow succeeded to the whole estate to the exclusion of daughters and collaterals. This mode of succession is in direct contravention of the rules of Muhammadan Law, and it shows that whenever a widow succeeded to the whole estate of her husband she succeeded only to a life interest and not as full owner. The entry in the *Rivaj-i-am*, which is referred to by the Divisional Judge, clearly says that the widow succeeds to a life tenure only and that her power of alienation is restricted. Counsel for the appellant, realising his difficulty, contended himself with urging, on general grounds, that the family of the parties being that of Quraishi Sheikhs and the estate of the common ancestor, Qazi Hisam-ud-din, having been divided according to Muhammadan Law, the presumption is that that law is followed by the parties, and that the plaintiffs-respondents had failed to prove that any definite rule of custom had been adopted under which the widows had no power to alienate the property in their possession. Such general arguments cannot, however, prevail against the undoubted instances of succession according to customary rules in this very family; and we have no hesitation in holding, in agreement with the Courts below, that the parties follow custom and not Muhammadan Law.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 80.

Before Hon. Mr. Justice Shah Din.

ILAH BUX—(DEFENDANT)—APPELLANT

Versus

MUHAMMAD RAB NAWAZ KHAN—(PLAINTIFF)—
RESPONDENT.

Civil Appeal No. 61 of 1912.

Punjab Pre-emption Act, II of 1905, sections 25 and 29—period of limitation as between rival pre-emptors—Indian Limitation Act, article 120.

Held, that section 29 of the Punjab Pre-emption Act does not contemplate cases in which two or more rival pre-emptors, having brought separate suits in respect of the same sale, the plaintiff in each suit is joined as a defendant in each of the other suits under section 25 of the Act, and that consequently the period of limitation as between the rival pre-emptors continues to be six years under article 120 of the Limitation Act.

Durga v. Haidar Ali (1), 11 P. R. 1893 (*Mutsadda Singh v. Hamira*) (2), and 20 P. R. 1908 (*Ram Parshad v. Ganga Datt*) (3), referred to.

Further appeal from the decree of H. Scott Smith, Esquire, Additional Divisional Judge, Multan Division, at Ferozepore, dated the 25th May 1911.

Durga Das for appellant.

Sheo Narain for respondent.

The judgment of the learned Judge was as follows:—

16th March 1912.

SHAH DIN, J.—This appeal was admitted under section 70 (1) (b) of the Punjab Courts Act on the question of limitation raised in the third ground, and under sub-clause (iii) of the proviso to clause (b) aforesaid, I am precluded from revising the decision of the Lower Appellate Court, except in so far as such decision involves the question of limitation, in respect of which the application for revision has been admitted as an appeal.

As regards the point of limitation raised in this case, I think that the view taken by the Divisional Judge is correct. It is not disputed that before the passing of the Punjab Pre-emption Act, 1905, it was uniformly held that in pre-emption suits brought by two rival pre-emptors in respect of the same sale in which each pre-emptor was impleaded as a defendant in the suit, instituted by the other, the period of limitation as between the two rival pre-emptors was that prescribed by article 120 of the second schedule of the Indian Limitation Act

(1) (1894) I. L. R. 7 All. 167.

(2) 11 P. R. 1893.

(3) 20 P. R. 1908.

and not that prescribed by article 10 of that schedule—see *Durga v. Haidar Ali* (1), 11 P. R. 1893 (*Mutsadda Singh v. Hamira*) (2) and 20 P. R. 1908 (*Ram Parshad v. Ganga Datt*) (3). The question for decision in this appeal, therefore, is whether section 29 of the Punjab Pre-emption Act has reduced the period of limitation applicable to such suits from six years to one year. Since article 10 of the second schedule of the Indian Limitation Act obviously does not apply to such suits, the period of one year prescribed by section 29 aforesaid has to be calculated by reference to sub-section (1) of that section. That sub-section does not contemplate the case in which two or more rival pre-emptors, having brought separate suits in respect of the same sale, the plaintiff in each suit is joined as a defendant in each of the other suits under section 25 of the Pre-emption Act; it only covers the case of a contest between the original vendee or his successor in title and the pre-emptor, the period of limitation being one year from the date of the attestation (if any) of the sale by a Revenue officer under Act XVII of 1887, or from the date on which the vendee takes under the sale physical possession of any part of the land or property sold, whichever date shall be the earlier. In the present case, the respondent brought his suit against the original vendee within the period of one year from the date on which the latter took possession of the land in dispute, and he, therefore, fully complied with the provisions of section 29 of the Pre-emption Act. The appellant, who is the rival pre-emptor, brought his suit for pre-emption after the respondent had instituted his suit, and as the appellant's suit was filed on the last day of limitation, it was obviously impossible for the respondent to have impleaded him as a defendant in his own suit within one year from the date of sale. The appellant's pleader admits that his argument that section 29 aforesaid applies to cases like the present would lead to absurd results, but he urges that the absurdity of the results is no ground for not applying the section to such cases. Apart, however, from the question of absurdity or otherwise of the results that may issue, the section in question in terms does not apply to cases of this kind; and I have therefore no hesitation in holding that the respondent's suit for pre-emption is not barred by limitation as against the present appellant.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) (1884) I. L. R. 7 All. 167.

(3) 20 P. R. 1908,

(2) 11 P. R. 1893.

No. 81.

*Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice
Shah Din.*

TULSI RAM—(DEFENDANT)—APPELLANT

Versus

RAM CHANDAR—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 767 of 1910.

*Custom—Alienation—Kalals of mauza Kalal Hatti, Ambala District—
governed by custom and not Hindu Law.*

*Held, that Kalals of mauza Kalal Hatti, Ambala District, are governed
in matters of alienation by custom and not their personal law.*

*Further appeal from the decree of H. A. Rose, Esquire, Divisional
Judge, Ambala Division, dated 18th November 1909.*

Dwarka Das for appellant.

Sangam Lal for respondent.

The judgment of the Court was delivered by—

18th March 1912.

RATTIGAN, J.—The petition for revision in this case was admitted as a further appeal under section 70 (1) (b), and Mr. Dwarka Das, for the appellant, wished to re-open the whole case, specially with reference to the question whether the alienation had not been proved to be for necessity in all particulars. We notice also that the respondent has filed cross objections which deal with certain other items in respect of which necessity was found to have been established.

In our opinion the sole important question involved in the case was whether the parties, who are Kalals of mauza Kalal Hatti in the Ambala District, are governed, in matters of alienation, by custom or by their personal law, and it is upon this question only that we have allowed the appeal to be argued.

At the same time this very point has been fully considered by this Court in Civil Appeal No. 371 of 1902, in which case the parties were also Kalals of this very village. It was there held that Kalal Hatti is a village of an unusual type owned entirely, or very nearly so, by formerly agricultural Kalals and that the residents of this village are undoubtedly governed by the principles of customary law and not by Hindu Law.

In the present case, it is proved by the evidence of the patwari and also by the admission of Nathu, the alienor, himself that Nathu owns a large area of agricultural land and that he actually cultivates a portion of this land himself. In the circumstances, we see no reason to differ from the finding of

the Courts below that the parties are actually governed by customary law. We, therefore, dismiss this appeal with costs, and for reasons above given, we also dismiss the cross-objections of the respondent which deal merely with the facts relating to the items which have been allowed.

Appeal dismissed.

No. 82.

Before Hon. Mr. Justice Scott-Smith.

SAID KHAN—(PLAINTIFF)—APPELLANT

Versus

MUSSAMMAT MATWALA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 695 of 1911.

Limitation—Pre-emption suit—in respect of sale, requiring sanction of Deputy Commissioner—starting point of limitation—Punjab Alienation of Land Act, XIII of 1900, sections 3 and 14—Punjab Pre-emption Act, sections 21 (2) and 26.

Held, that for the purposes of a pre-emption suit, in respect of a sale which requires the sanction of the Deputy Commissioner under the Punjab Alienation of Land Act, limitation starts from the date on which sanction is given and not from the date of mutation.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge, Rawalpindi, dated the 6th January 1911.

Beni Pershad for appellant.

Gobind Das for respondents.

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J.—This appeal and No. 696 have been 23rd March 1912. admitted under section 70 (1) (b) of the Punjab Courts Act.

Both the Lower Courts have dismissed these suits for pre-emption on the ground that they are barred by time.

The sales took place in the summer of 1907 and were entered in the mutation register on 22nd May 1907, but were not sanctioned by the Deputy Commissioner, acting under the Land Alienation Act, until 6th November 1908. The suits were brought on 24th August and 9th October 1909, *i.e.*, within a year of the date of the Deputy Commissioner's sanction, and it is argued that they are therefore within time, as before sanction the transactions only operated as mortgages and not as sales under section 14 of the Land Alienation Act.

The Divisional Judge argued that sections 21 (2) and 26 of the Punjab Pre-emption Act made it clear that it was

contemplated that suits should be brought before sanction was obtained.

I do not think the Divisional Judge has rightly read section 21 (2) of the Pre-emption Act. That section must be read with section 20; section 21 (1) refers to section 20 (a) and (b) and section 21 (2) to section 20 (c). This shows that the word "sale" in section 21 (2) means the sale to the plaintiff, and not that sought to be pre-empted. Section 26 then means that the plaintiff (decree-holder) shall not obtain possession of the land until he has received sanction of the sale to himself under section 3 (2) of the Land Alienation Act. I hold that plaintiff's starting point of limitation was the date of the sanction given by the Deputy Commissioner to the original sale to Ghulam Haider.

Whether that sanction was necessary is another point which has not been decided by the Divisional Judge.

I accept the appeal, and setting aside the order of the Lower Appellate Court remand the appeal to it for rededecision under order XLI, rule 23, Civil Procedure Code, stamp to be refunded, and other costs to be costs in the cause.

Appeal accepted.

No. 83.

Before Hon. Mr. Justice Rattigan and Hon. Mr. Justice Shah Din.

IFTIKHAR ALI AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

THAKAR SINGH—(PLAINTIFF)—AND MUSSAMMAT
BHAGWAN DEVI—(DEFENDANT)—(RESPONDENTS).

Civil Appeal No. 203 of 1911.

Pre-emption in respect of sale of agricultural land—decreed by first Court on payment of Rs. 7,000—valuation of suit for purposes of appeal—Punjab Courts Act, XVIII of 1884, section 39—withdrawal of money paid into Lower Court by pre-emptor, no bar to appeal by vendee.

Plaintiff sued for pre-emption in respect of a sale of agricultural land, thirty times the revenue of which amounted to Rs. 1,132. The first Court decreed the claim on payment of the full price, Rs. 7,000.

Held, that notwithstanding the decree so passed, the value of the suit for purposes of jurisdiction, so far as section 39 of the Punjab Courts Act is concerned, remained throughout Rs. 1,132 and that consequently the appeal from the decree of the first Court lay to the Divisional Court and not to the Chief Court.

16 P. R. 1908 (F. B.) (*Muhammad Afzal Khan v. Nand Lal*) (1), 58 P. R. 1902 (*Maman Mal v. Abdul Aziz*) (2), and *Ibrahimji Issaji v. Bejanji Jam-sedji* (3), referred to and distinguished.

Held also, that the fact that the vendee had withdrawn the money, paid into the Lower Appellate Court under its decree by the pre-emptor, did not debar the vendee from appealing against that decree.

16 P. R. 1907 (*Sundar Das v. Dhanpat Rai*) (4), followed.

Further appeal from the decree of W. A. LeRossignol, Esquire, Divisional Judge, Amritsar Division, dated the 15th November 1910.

Kishori Lal for appellant.

Zia-ud-Din, Thakar Singh, one of the respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal arises out of a suit brought by 25th March 1912. the plaintiff-respondent against the defendants-appellants for possession by pre-emption of the land in dispute which had been sold by one Mussammat Bhagwan Devi to the defendants for Rs. 7,000 by a registered deed dated the 28th May 1908. The Subordinate Judge passed a decree in favour of the plaintiff conditional on his paying the full amount of the purchase money, Rs. 7,000, to the defendants-vendees within a certain time. On appeal the Divisional Judge held that the price of the land had not been paid and fixed in good faith, and he remanded the case for further enquiry and report on the question of the market value of the land sold. On receipt of a return to the order of remand, the learned Judge held that the market value of the land was Rs. 5,300 and he accordingly varied the decree of the Subordinate Judge by reducing the amount payable by the plaintiff to the vendees to that figure.

The vendees have preferred a further appeal to this Court and the case has been fully argued on both sides. The learned pleader for the plaintiff-respondent has urged as a preliminary objection that since the vendees have drawn out Rs. 5,300 which had been deposited in Court by his client in pursuance of the decree passed by the Divisional Judge, they are precluded from proceeding with their appeal; and in support of this contention he has cited an unpublished decision of this Court *Feroze-ud-din v. Ghulam Rasul*. As pointed out in the judgment of this Court in 16 P. R. 1907 (*Sundar Das v. Dhanpat Rai*) (4) the case cited is clearly distinguishable upon its peculiar facts from the case like the present, and we need say here no more than that we accept as a general proposition the law as pro-

(1) 16 P. R. 1908 (F. B.).
(2) 58 P. R. 1902.

(3) (1895) I. L. R. 20 Bom. 265.
(4) 16 P. R. 1907.

pounded in the published case just mentioned. The preliminary objection is therefore over-ruled.

The questions for decision in this appeal are :—

- (1). Whether the appeal from the decree of the Subordinate Judge lay to the Divisional Court or to this Court ;
- (2). Whether the price entered in the sale deed, namely, Rs. 7,000 was paid or fixed in good faith ; and
- (3). If the price was not paid or fixed in good faith, whether the market value of the land sold is Rs. 5,300 as held by the Divisional Judge, or Rs. 7,000 as found by the Court of first instance.

As regards the first question, it has been contended by the appellant's pleader that as the Subordinate Judge had passed a decree in favour of the plaintiff-respondent for possession of the land in dispute on payment of Rs. 7,000, the value of the subject-matter of the suit must be held for purposes of jurisdiction to have been Rs. 7,000, and therefore the appeal from the decree of the Subordinate Judge lay to this Court and not to the Divisional Court. In support of this contention he has cited the Full Bench Ruling of this Court, 16 P. R. 1908 (F. B.) (*Muhammad Afzal Khan v. Nand Lal*) (1). The case cited does not, however, deal with the point now before us or lay down the proposition of law contended for by the appellant's pleader. It was a pre-emption suit instituted in the Court of a Munsif of the first class for recovery of possession of agricultural land. Its value for purposes of jurisdiction, as laid down by the rules in force under the Suits Valuation Act, was Rs. 644. The Munsif, whose jurisdiction was limited to Rs. 1,000, passed a decree in favour of the plaintiff on payment of Rs. 4,098. With reference to an objection that the Munsif had no jurisdiction to pass a decree for possession of the land conditional on payment of the said amount, it was held by a Full Bench of this Court that as the sum fixed by the Court to be payable as the actual value of the land in suit was in excess of the pecuniary limits of the Munsif's jurisdiction, he was not competent to pass a decree in the case but should have returned the plaint for presentation to a Court having jurisdiction to pass such a decree. The Full Bench did not consider and decide the question now before us, namely, whether in a pre-emption suit relating to land of which the value for purposes of jurisdiction is, under the Suits

Valuation Act, less than Rs. 5,000, but in which a decree has been passed by the Court of first instance on payment of more than Rs. 5,000, the appeal from that decree lies to the Divisional Court or to this Court. The sole question before the Full Bench, which it was called upon to decide and which it did actually decide, was whether in a pre-emption suit relating to land of which the value was less than Rs. 1,000, the Court of first instance, which was that of a Munsif of the first class with pecuniary jurisdiction up to Rs. 1,000, had power to pass a decree for possession of that land on payment of more than Rs. 1,000, and that question was answered by the Full Bench in the negative.

With reference to certain observations made by the learned Chief Judge in the course of his judgment in the above mentioned case at pages 92 and 93 of the report, the appellant's pleader has argued that the value of the present suit, which according to the rules framed under the Suits Valuation Act, was Rs. 1,132-0-6, was merely a tentative value; that as soon as the Subordinate Judge found that the actual value of the land in dispute was Rs. 7,000 and granted the plaintiff-respondent a decree for possession thereof on payment of Rs. 7,000, the real value of the suit became Rs. 7,000; and that that amount must be considered as the value of the subject-matter of the suit for purposes of jurisdiction and of appeal subsequent to the passing of the decree by the Subordinate Judge. In this connection, he has also relied on the decision of this Court No. 58 P. R. 1902 (*Maman Mal v. Abdul Aziz*) (1). In the passage cited to us from his judgment the learned Chief Judge did not, in our opinion, intend to deal with the question of appeal under section 39 of the Punjab Courts Act or to lay down that the value of the pre-emption suit, which was being dealt with by the Full Bench, as fixed by the rules in force under the Suits Valuation Act, was for the purposes of that section a fluctuating one, and that it was increased to Rs. 4,098, as soon as the Munsif held that the amount payable by the pre-emptor to the vendee was Rs. 4,098, which represented the actually market value of the land. All that was actually held was that the value of the suit might well in such cases differ from the actual value of the land in dispute and that the Munsif had no jurisdiction to pass a decree in favour of the pre-emptor on payment of Rs. 4,098, on the general principle of law that a Court cannot pass a decree for payment of a sum beyond the pecuniary limits of its

(1) 58 P. R. 1902.

jurisdiction. As observed by another member of the Full Bench if the actual value of the land of which possession is claimed by the pre-emptor "is found by the Court to exceed the value as fixed in the first instance for jurisdictional purposes by the rules, the Court's jurisdiction to grant a decree will depend on whether the amount so found does nor does not exceed the limit of the Court's pecuniary jurisdiction". We consider that the decision of the Full Bench in the case cited must be held to be limited to the actual point before it; and any observations made by any of the learned Judges who were members of it, which were not essential to the determination of the question referred, must be treated as *obiter dicta*.

No. 58 P. R. 1902 (*Maman Mal v. Abdul Aziz*) (1), relied on by the appellants' pleader is not in point. That was a suit for dissolution and winding up of a partnership, rendition of accounts by the defendants and a decree for such sums as the plaintiffs might be found entitled to against the proper parties. The plaintiffs valued their suit approximately at Rs. 2,000, but added the usual clause that they would pay the additional Court fee if more was found due. The District Judge passed a decree in favour of the plaintiffs for Rs. 6,410. The defendants appealed to the Divisional Judge who modified the decree. On further appeal to this Court, it was contended that the Divisional Judge had no jurisdiction to hear the appeal; and it was held by this Court that the contention was correct, inasmuch as the value of the suit, which means the value of the subject-matter of the suit, was in that case more than Rs. 5,000, and therefore the appeal lay to this Court and not to the Divisional Court. In the course of his judgment Chatterji J. said. "Now the plaintiff valued his "plaint at Rs. 2,000, but stated that he would make up Court-fees "for any higher sum found to be due by the Court. The Court "found Rs. 6,410-14-1½ due from the defendants, but ordered "Court-fees to be levied on Rs. 5,332-13-1½ only. Does not this "finding affect the valuation originally fixed by the plaintiff for "his suit which he expressly stated was a tentative one? This "appears to be the view taken by the Bombay High Court in "*Ibrahimji Issaji v. Bejanji Jamsedji* (2).....section 8 of the "Suits Valuation Act makes the jurisdictional value and the "value for Court-fee the same in this class of cases, and section "11 of the Court-fees Act allows the stamp to be made up "afterwards. The two sections read together allow the plain-

“tiff to put a tentative valuation on his claim and file the
“required amount of Court-fees when a higher sum is found
“due. Thus the payment of Court-fees on Rs. 2,000 is no final
“test of the value of the suit, as section 8 of the Suits Valuation
“Act standing by itself, would possibly lead one to conclude”.
Again, at page 221 the learned Judge observed: “It is to
“be borne in mind that the value in suits of the present
“description is allowed by law to be a fluctuating one, a definite
“sum being stated in the plaint as a starting point for inquiry,
“and is finally fixed when the Court passes its decree”.

It will appear from the above passages that the case cited, which was one for dissolution of partnership and rendition of accounts, and which, as regards valuation for purposes of jurisdiction and Court-fee, belongs to a class of suits covered by section 8 of the Suits Valuation Act and section 11 of the Court-fees Act, has no bearing on the present case so far as the question of its jurisdictional value is concerned. In a pre-emption suit relating to revenue-paying agricultural land in this Province, the value of the subject-matter of the suit for purposes of jurisdiction is fixed by the rules framed under section 3 of the Suits Valuation Act at thirty times the land revenue, and it is fixed once and for all. The valuation of the suit is also definitely fixed for purposes of Court-fees by section 7, paragraphs V and VI of Act VII of 1870 at five times the revenue. The plaintiff in such a suit is therefore precluded by law from putting a tentative value on his suit either for purposes of Court-fees or for purposes of jurisdiction, the valuation of the suit for these purposes being beyond his power. On the other hand, in a suit for accounts the plaintiff is expressly allowed by law to fix the amount at which he values the relief sought, and that amount in the first instance determines the value of the suit for purposes of Court-fees and also for purposes of jurisdiction (section 7, paragraph IV of Act VII of 1870 and section 8 of Act VII of 1887), such valuation being liable to be altered on the Court holding that a larger amount than that claimed by the plaintiff is really due to him. The first valuation of the suit which depends upon the approximate amount which the plaintiff originally claims, is not a fixed one, it is fixed, both for purposes of jurisdiction and for purposes of Court-fee, so far as the first Court is concerned, only when that Court holds a certain definite sum to be due to the plaintiff; and as that sum finally determines the value of the suit in the first Court, it also determines it for the purposes of the appeal from the decree of that Court. In a pre-emption suit such as the present, these considerations have no applica-

tion at all. The value of the suit, both for purposes of jurisdiction and of Court-fees, is fixed once and for all by the rules framed under the Suits Valuation Act and by the Court-fees Act; and although according to the Full Bench decision, No. 16 P. R. 1908 (*Muhammad Afzal Khan v. Nand Lal*) (1), the decree which has been passed in this case by the Sub-Judge could not have been passed except by a Court having jurisdiction to pass a decree for more than Rs. 5,000, the value of the suit for purposes of jurisdiction, so far as section 39 of the Punjab Courts Act is concerned, notwithstanding the decree so passed, remained throughout thirty times the land revenue, which is Rs. 1,132-0-6, and the value for purposes of Court-fees also remained five times the revenue. We hold, therefore, that even after the Sub-Judge passed his decree the value of the suit before us was less than Rs. 5,000, and it follows that under section 39 (c) of the Punjab Courts Act the appeal from that decree lay to the Divisional Court and not to this Court.

[The remainder of the judgment is not required for the purpose of this report].

Appeal accepted.

No. 84.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Chevis.

**BHAGWAN DAS AND OTHERS—(PLAINTIFFS)—
APPELLANTS**

Versus

**BHANA MAL AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 895 of 1910.

Indian Limitation Act, IX of 1908, section 22 and article 47—defendant made plaintiff during pendency of suit.

Held that a person, bound by an order respecting the possession of immoveable property made under the Code of Criminal Procedure, 1898, must bring his suit for possession within 3 years from date of the final order, that the Civil Court has no jurisdiction to question the validity of the order and that the period of 3 years cannot be extended on the ground that part of the property in suit was in possession of a mortgagee.

Held also, that sub-section (2) of section 22 of the Limitation Act of 1908 makes it quite clear that sub-section (1) does not apply to cases where defendants are made plaintiffs during the pendency of a suit.

149 P. R. 1907 (*Behari Lal v. Ram Chand*) (2), referred to.

First appeal from the decree of Khan Taj Muhammad Khan, District Judge, Attock, dated 14th May 1910.

Shadi Lal and Gobind Das for appellants.

Pestonji Dadabhai for respondents.

The judgment of the Court was delivered by—

KENSINGTON, J.—In 1895 or 1896 one Hira Singh Arora died **28th March 1912.** leaving property of considerable value. On the 18th February 1897 his widow executed a registered deed of gift of this property in favour of her nephew Bhana, now defendant. On the 16th July 1897 the widow died. There was then a dispute about the property in a Criminal Court under section 145 of the Criminal Procedure Code between Bhana and the present plaintiff No. 1, named Bhagwan Das, who claimed the property as sister's son of Hira Singh. This dispute was settled by the order of a competent first class Magistrate, dated the 6th January 1898, printed at pages 6 and 7 of the paper book. The Magistrate's decision was that Bhana was in possession and an injunction issued against Bhagwan Das forbidding him to interfere with Bhana's rights, until he should obtain a decree in a proper Court. On the 16th February 1909 the present suit was instituted by Bhagwan Das against Bhana as principal defendant the object being to recover the property of which Bhana had been left in possession for nearly twelve years from the time of the death of Hira Singh's widow.

In the original plaint as filed the names of three other persons were added as *pro formâ* defendants. These persons were Mitha, son of another sister of Hira Singh, and Karam Chand and Gokal Chand, nephews of Bhagwan Das. On the 2nd of October 1909, the plaintiff amended his plaint under instructions from the Court and on three subsequent dates in October, November and December 1909 the three formal defendants were at their own requests joined as plaintiffs in the suit, which thereafter proceeded as one by Bhagwan Das and three other relatives of his as against the sole defendant Bhana.

The lower Court has dismissed the suit as regards the plaintiff Bhagwan Das on the ground that it is time barred under article 47 of the First Schedule to the Limitation Act, and as regards the other three plaintiffs as time barred under section 22 of the Act. The case is now before us on appeal by all four plaintiffs.

We have no hesitation in saying that the lower Court is correct in applying article 47 of the Limitation Act Schedule to the plaintiff Bhagwan Das. By that article a short period

of three years' limitation is given to any one bound by an order under the Criminal Procedure Code, if he desires to recover possession of the property referred to in that order. The terms of the order of 6th January 1898 are quite explicit and no sort of explanation is given to us of the reason why Bhagwan Das did not institute his suit within this period of three years. There is indeed no explanation at all of his extraordinary delay for over eleven years. All that can be said for him is that he understood that he had 12 years' limitation under article 141, reckoned from the date of death of Hira Singh's widow. That article would no doubt be the one ordinarily applicable to a suit of the kind, but in the present case Bhagwan Das was required to sue within the shorter period of three years prescribed by article 47. Counsel for the appellants has endeavoured to get over this difficulty by an argument from analogy with reference to rulings passed under articles 11 and 12. He has endeavoured to shew that the validity of the order of the 6th January 1898 can be called in question on the ground that the formalities of section 145 of the Criminal Procedure Code were not complied with. We cannot allow this argument. There appears to us no doubt that Mr. Estcourt's magisterial order of 1898 was passed with jurisdiction and we do not consider that the Civil Courts are entitled 11 years afterwards to call in question the circumstances under which the order was passed. We see no reason for assuming that there was insufficient compliance with the terms of section 145 of the Criminal Procedure Code and in any case article 47 of the Limitation Act Schedule says nothing about the validity of such order. That article lays down categorically that three years' limitation will run from the date of the final order in the case as against the person affected thereby. We ourselves see no reason whatever for supposing that the order was defective, but even if it could be assumed that there was some defect, we do not think that a Civil Court has any jurisdiction to declare the order void in the manner suggested by counsel.

The only other argument which counsel was able to advance on behalf of Bhagwan Das is, that in 1898 part of the property in dispute was in possession of a mortgagee. It is suggested that as plaintiff was unable to recover from the mortgagee he was under no obligation to sue for the remainder of the property of which Bhana was in possession. We think that this argument also is without any force. It was open to the plaintiff to claim possession of the entire property subject to any lien which might have been possessed by a mortgagee on some portion of it. The mere fact of a mortgage did not protect him from the

operation of article 47. Our conclusion is therefore that so far as the plaintiff Bhagwan Das is concerned the present suit has been rightly dismissed.

As regards the remaining plaintiffs the lower Court has clearly fallen into error. The question here is whether, when the defendants to a suit are made co-plaintiffs during its pendency, the suit will as regards them be treated as instituted when the plaint was originally filed or when they were joined as plaintiffs. There was a certain amount of doubt on this point under section 22 of the Limitation Act as it stood in Act XV of 1877. Even then however the general current of legal decisions had been to the effect that the suit would not be deemed to have been instituted from the date on which defendants were made plaintiffs. On this point it is sufficient to refer to the ruling 149 P. R. 1907 (*Behari Lal v. Ramchand*) (1), in which the question has been discussed. In any case, however, such doubt as there might conceivably have been under the Act of 1877 has been set at rest by the alteration of section 22 in the present Limitation Act, IX of 1908. Sub-section (2) of that section now makes it perfectly clear that sub-section (1) does not apply to cases where defendants are made plaintiffs during the pendency of a suit. This alteration of the law has been entirely overlooked by the lower Court. The result is that as regards the appellants with Karam Chand and Gokal Chand the suit is within time reckoning from the original date of institution on 16th February 1909. These plaintiffs were not affected by the order of the Criminal Court referred to above and they enjoyed the benefit of full twelve years' limitation reckoning from the 16th July 1897. We cannot allow the argument of defendants' counsel that it should be held that the suit was non-existent up to October 1909, in view of the fact that till then it had been instituted only by a plaintiff against whom it was time barred. There is no such qualification about the terms of section 22 of the present Limitation Act and we cannot read into the Act words which it does not contain. For the purposes of these plaintiffs, a suit had been instituted on the 16th February 1909 and they are entitled to the benefit of that institution, even though the original plaintiff may be himself unsuccessful.

The result is that the appeal fails as regards the plaintiff Bhagwan Das, but must succeed as regards the remaining three plaintiffs. The decree of the lower Court is set aside in regard to them and the case is remanded under rule 23, order XLI of

the Civil Procedure Code, for fresh decision on the merits in respect of these three plaintiffs. Stamp duty on the appeal will be refunded, remaining costs of this Court will be costs of the cause and will follow the eventual result.

Case remanded.

No. 85.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Chevis.

MUSSAMMAT KARIMAN AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

FAZAL MUHAMMAD—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1274 of 1911.

Custom—succession—right of widow or widow of predeceased son, in presence of a son—Gujars—Tahsil Ludhiana—Rivaj-i-am.

Held, that it had not been proved that by custom among Gujars of tahsil Ludhiana a widow was entitled to succeed to the property of her deceased husband equally with her stepson.

49 P. R. 1910 (*Amir v. Mussammat Sharf Nur*) (1), 116 P. R. 1906 (*Elahi Bakhsh v. Khewni*) (2), 107 P. R. 1886 (*Shada v. Mussammat Jio*) (3), referred to.

Held also, that the widow of a predeceased son is in this respect in a position, even worse than that of the widow.

75 P. R. 1888 (*Mussammat Hayat Bibi v. Sultan*) (4), 8 P. R. 1889 (*Mussammat Fazlan v. Kamman*) (5), and 23 P. R. 1892 (*Sandal Khan v. Mussammat Akki*) (6), referred to.

First appeal from the decree of T. P. Ellis, Esquire, District Judge, Ludhiana, dated the 11th November 1910.

Fazal Elahi, for appellant.

Kamal-ud-din, for respondent.

The judgment of the Court was delivered by—

28th March 1912. KENSINGTON, J.—The circumstances of this unfortunate family dispute are as follows :—Fattu Gujar of the Ludhiana District died on the 7th February 1904, leaving a large estate of some 1,400 *bighas kac'la* of land. Fattu had two wives both still alive. The first wife Mussammat Kariman, now a very old woman, was sonless and she is the principal defendant in the case. By the second wife, Mussammat Umri, Fattu had two

(1) 49 P. R. 1910.
(2) 116 P. R. 1906.
(3) 107 P. R. 1886.

(4) 75 P. R. 1888.
(5) 8 P. R. 1889.
(6) 23 P. R. 1892.

sons of whom the elder named Rukna pre-deceased him, leaving a widow Mussammatt Rajjan defendant. The younger son Fazal Muhammad now aged about 15 (fifteen) is the plaintiff in the case, as a minor suing through his mother Mussammatt Umri as his next friend.

Mutation proceedings followed very shortly after Fattu's death and on the 23rd February 1904 mutation was sanctioned as to one-half in the name of Mussammatt Kariman and as to one-fourth each in the names of Fazal Muhammad and Mussammatt Rajjan. The inquiry was very brief and no reasons were given for this distribution, but possibly there was at the time no dispute. The minor plaintiff has now more than six years later brought the present suit for possession of the three-fourths share awarded to the two widow defendants asserting himself to be the sole heir of his father Fattu. In paragraph 4 of his plaint he professed willingness to give ordinary maintenance to the defendants but the learned Divisional Judge has held that the defendants should have made a counter claim for maintenance and has on that ground declined to go into the question. On the main question arising in the suit he has decided that the defendants have failed to establish a custom entitling them as of right to specified shares in Fattu's estate and he has therefore given the plaintiff a decree in full with costs. The case is now before us on an appeal by the two widow-defendants.

It is not in dispute that as a matter of general custom, stated in article 16 of Rattigan's Digest of Customary Law, the plaintiff is the sole heir of his father, and we think that the District Judge was therefore right in throwing the burden of proof of a special custom to the contrary upon the defendants under the first two issues in the case.

Counsel for the defendants has contended that the burden of proof should have been shifted, after the defendants had produced the extract from the *Riwaj-i-am* for Gujars of *tahsil* Ludhiana which is printed at page 3 of the paper book. We observe however that this extract was only produced on the 11th November 1910 on which date the issues were amended and evidence was taken and the case was decided. The special custom set up applies only to the defendant Mussammatt Kariman and even in her case it is so entirely opposed to the general custom of the province that we cannot accept the *Riwaj-i-am* entry, even when read with the commentary given in paragraph 112 of the Customary Law Code for the Ludhiana District, as sufficient authority for shifting the burden of proof. In any case both sides have produced such evidence as they rely on to prove instances supposed to be in their favour and it can

hardly be said that the defendants have been prejudiced by the manner in which they were called on to establish their point.

We do not consider the oral evidence produced by either side to be of any great value. At the most it indicates that in certain cases a childless widow has been allowed to take a share of her husband's land, notwithstanding the presence of a son or sons by a second wife, while in other cases no such arrangement has been made. In none of the instances quoted does there appear to have been any dispute and family arrangements of this kind do not settle the question of custom one way or the other. The *Riwaj-i-am* entry is unsupported by instances, and though it may represent a feeling that the interests of a childless widow should be protected to some extent it can hardly be said in the absence of any judicial decision one way or the other that the special custom is generally recognized to such an extent that the Courts are bound to give effect to it.

The only published ruling of this Court which counsel has been able to quote on behalf of Mussammat Kariman is 49 *P. R.* 1910 (*Amir v. Mussammat Sharf Nur*) (1), which was a case concerning Mughals of Rawalpindi, and it is not safe to apply a ruling of this kind to a district like Ludhiana, where custom is in general much more precise than in the northern and western portions of the province. On the other hand there is a definite ruling to the contrary as regards Aráins of the Ludhiana District, for whom the same *Riwaj-i-am* entry was made as for Gujars in 116 *P. R.* 1906 (*Elahi Bakhsh v. Khewni*) (2). The whole question was there carefully considered and it was held that no custom entitling a widow to succeed equally with her step-son had been proved to exist. A similar decision was also given in 107 *P. R.* 1886 (*Shada v. Mussammat Jio*) (3), as regards Aráins of the Ferozepur District and there too the point was carefully considered.

Our conclusion from all the material available is that the District Judge has so far decided the case correctly. Notwithstanding the entry in the *Riwaj-i-am* we cannot hold that there is sufficient evidence to shew that a special custom, opposed to the ordinary general custom of the Punjab, is followed either generally or even to such an appreciable extent as to require us to take it as proved. We find accordingly that the appeal must fail to this extent in respect of Mussammat Kariman's demand

(1) 49 *P. R.* 1910.

(2) 116 *P. R.* 1906

(3) 107 *P. R.* 1886.

for a half share of Fattu's estate in terms of the mutation proceedings for 1904.

The case of Mussammat Rajjan as the widow of a predeceased son is even weaker than that of Mussammat Kariman. The general rule is here stated in article 9 of Rattigan's Digest. As against this, counsel for the defendant has referred to the rulings : 75 *F. R.* 1888 (*Mussammat Hayat Bibi v. Sultan*) (1), 8 *P. R.* 1889 (*Mussammat Fazlan v. Kamman*) (2) and 23 *P. R.* 1892 (*Sandal Khan v. Mussammat Akki*) (3), in all of which the widow of a predeceased son has in certain circumstances been recognized as entitled to her husband's share in the districts of Gujrat and Hoshiarpur. We cannot, however, treat these rulings as laying down any general principle and the only instance directly in point among those quoted in the judgment of the Lower Court is that of the village of Talwandi Kalan, where the right of the widow of a predeceased son to share equally with her husband's brothers was accepted in an uncontested mutation proceeding. It appears to us that this is altogether insufficient to establish the unusual special custom set up and we are not prepared to differ from the District Judge.

It follows from all this that the defendants cannot in our opinion retain the shares of one-half and one-fourth of Fattu's holding allotted to them respectively in the mutation proceedings of 1904. They are not entitled to these shares under the general custom of inheritance prevailing in Ludhiana. It is much to be regretted that the plaintiff should have been put forward by Mussammat Umri to plunge the family into litigation, seeing that in any case the great age of Mussammat Karinian makes it improbable that she can much longer enjoy the half share of the holding of which she is at present the recorded proprietor for life, and to a lesser extent the same consideration might very well have been allowed to prevail in the case of Mussammat Rajjan. We do not suppose that the plaintiff was really prejudiced to a material extent by the nominal distribution of Fattu's land effected in 1904, and we are inclined to think that Mussammat Umri has been badly advised in causing the present suit to be instituted. At the same time we feel bound to say that the plaintiff's suit cannot be wholly dismissed upon such evidence as the defendants have been able to produce.

It does not however follow that the plaintiff should have been given the decree in full which has been passed in his favour

(1) 75 *P. R.* 1888.

(3) 23 *P. R.* 1892.

(2) 8 *P. R.* 1889.

by the Lower Court. The two widow defendants are undoubtedly entitled to liberal maintenance and this is readily conceded by the plaintiff's pleader who has left the matter in the hands of the Court. We have a wide discretion to award such maintenance as may be required by the circumstances of any particular case either in cash or by allotment of some specified proportion of the family land. Generally speaking an allowance in cash is a sufficient protection for the widows of a family, but in the present case we think that something more is required in consequence of the bad feeling arising out of this unnecessary litigation. The only satisfactory way of protecting the defendants, now that a bitter dispute has arisen, is to give them specified shares in the holding by way of maintenance and not by way of inheritance. We think that these shares may, considering the large size of the holding concerned, be fairly taken at one-fourth in the case of Mussammat Kariman and one-eighth in the case of Mussammat Rajjan, the practical effect of which is that the plaintiff's suit succeeds to the extent of one-half of the area of which he claims possession. The plaintiff has claimed the remaining three-fourths of Fattu's land in addition to the one-fourth allotted to him in 1904. He will succeed to the extent of half his claim, *i.e.*, three-eighths of the land in suit, the remaining three-eighths being apportioned as to two-eighths or one-fourth to Mussammat Kariman and as to one-eighth to Mussammat Rajjan. The appeal is accordingly accepted to this extent. We set aside the decree of the Lower Court and in place thereof we give plaintiff a decree for possession of half the area claimed by him. The effect will be that he will now be recorded as the proprietor of five-eighths in all of Fattu's land. The defendant Mussammat Kariman will be recorded proprietor of one-fourth and the defendant Mussammat Rajjan of one-eighth. The shares allotted to these defendants are by way of maintenance only and their ownership-right subsists in each case till death or remarriage with a proviso that on the death or remarriage of either defendant the share allotted to her will pass to the plaintiff. As the plaintiff has succeeded to the extent of only half his claim, we direct that the parties shall pay their own costs throughout.

Appeal accepted.

No. 86.

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice
Scott-Smith.*

**AMIR CHAND AND OTHERS—(PLAINTIFFS)—
APPELLANTS**

Versus

**KANHAYA RAM AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 1042 of 1910.

*Court-fees Act, schedule II, article 17, clause VI—Court-fee on appeal
with object of getting other defendants made liable for amount decreed by
first Court against one only.*

Where the lower Court granted the plaintiffs a decree against one of
several defendants and the plaintiffs appealed with the object of getting the
other defendants made jointly liable for the amount decreed—

Held, that the memorandum of appeal must bear an *ad valorem* Court-
fee stamp on the amount decreed by the Lower Court, and that article 17,
clause VI of the II schedule of the Court-fees Act was not applicable.

*First appeal from the decree of Shaikh Rukan-ud-din, District
Judge, Montgomery, dated the 11th day of July 1910.*

Shadi Lal for appellants.

Sheo Narain for respondents.

The order of the Court was delivered by—

SHAH DIN, J.—This is a suit for damages for breach of contract, and it has been brought under the following circumstances. The plaintiffs are a firm of grain-dealers, who carry on business at *mauza* Tibbi Lal Beg, *tahsil* Pakpattan, while the defendants Nos. 1 and 2, who are residents of *mauza* McLeod Ganj, are proprietors of a shop at *mauza* Sadiq Ganj known as Kanhya Ram-Ghumandi Ram, the business of which is conducted by defendants Nos. 4 and 5 as agents on behalf of the proprietors. The plaintiffs allege that on the 23rd *Poh Sambat* 1964 (corresponding to the 6th January 1908) defendant No. 3, Durbari Ram, who is a resident of *mauza* Durbariwala, made a contract with the plaintiff's firm at *mauza* Tibbi Lal Beg on behalf of the firm of Kanhya Ram-Ghumandi Ram for the purchase of 5,659 maunds of wheat at Rs. 4-9-0 per maund; that he duly executed a *satta*, as agent of the said firm, in which the terms of the contract were set out; that one of those terms was that the wheat was to be weighed on the 10th *Magh Sambat* 1964 corresponding to the 23rd January 1908, the entire purchase money to be paid on the 2nd *Magh* corresponding to the 15th January; and that Rs. 1,000 was agreed upon to be given as earnest money, of which Rs. 100 was paid in cash and a *hundi* for Rs. 900 was drawn by Durbari on his principals' 3rd April 1912.

shop at Sadiq Ganj. The plaint goes on to allege that the *hundi* for Rs. 900 was duly presented at the shop of the defendants but was dishonoured; that the defendants failed to pay the balance of consideration on the due date or to get the wheat weighed as agreed upon on the 23rd January 1908, that the market rate of wheat had since fallen by Re. 1 per maund; and that the plaintiffs were therefore entitled to recover from the defendants Rs. 5,659 as damages for breach of contract, in respect of which, after giving credit for Rs. 100 received out of the amount of earnest money agreed upon, they were entitled to obtain a decree for Rs. 5,559. The pleas of the defendants amount in substance to a denial that Durbari Ram was ever appointed agent by them to enter into a contract with the plaintiffs for the purchase of wheat on their behalf on the date in question, and the only point which, with reference to the pleadings of the parties, is of real importance in the case, and to which arguments on both sides have been confined before us, is whether Durbari was the *Gumashtha* or agent of the firm of Kanhya Ram-Ghumandi Ram, and whether he had authority from that firm to enter into the contract in question with the firm of the plaintiffs. On this point the District Judge has found in favour of the defendants' firm, holding that Durbari Ram was not the *Khepi Gumashtha* or agent of defendants Nos. 1 and 2, who are proprietors of the shop of Kanhya Ram-Ghumandi Ram, and that he was not authorized by them to purchase wheat from the plaintiffs' firm on the 6th January 1908. Accordingly, the District Judge has dismissed the plaintiffs' suit against all the defendants, except Durbari Ram, defendant No. 3, who has throughout admitted the execution of the *satta* sued upon by the plaintiffs, though at the same time he has pleaded that he executed it, not on his own behalf, but as agent of the firm of the defendants. The District Judge has held that Durbari Ram having executed the *satta* in question is personally liable for the loss sustained by the plaintiffs by reason of the breach of contract, and he has therefore decreed the plaintiffs' claim in full against Durbari Ram alone.

From the decree of the District Judge the plaintiffs have preferred an appeal to this Court against Kanshi Ram and Ghumandi Ram only, claiming a decree for the full amount, Rs. 5,559, against them as the principals of Durbari Ram, and urging that Durbari Ram had entered into the contract for the purchase of wheat with them as agent of these two defendants-respondents. They have affixed a Court-fee stamp of Rs. 10 on the memorandum of appeal, and the first question for decision is whether that stamp is sufficient. The learned counsel for

appellants relies upon article 17, clause VI, of Schedule II to the Court-fees Act, and with reference thereto contends that as the plaintiffs have already obtained a decree for the amount claimed against Durbari Ram and have appealed to this Court with the object of getting a joint decree for the same amount also against the respondents Kanhya Ram and Ghumandi Ram, who are proprietors of the defendants' firm, it is not possible to estimate at a money value the subject-matter in dispute in appeal, and that therefore a Court-fee stamp of Rs. 10 only is payable on the memorandum of appeal. We cannot accept this contention, as in our opinion clause VI of article 17 of the Court-fees Act does not cover a case of this description. The plaintiffs are not satisfied with the decree which they have already obtained against Durbari Ram for recovery of Rs. 5,559 and they claim in appeal to be entitled to get a decree for the same amount against Kanhaya Ram and Ghumandi Ram also, so that after obtaining the decree asked for, they should be in a position to recover the whole decretal amount, Rs. 5,559, if they choose, from these two respondents only and be thus relieved from the necessity of proceeding against Durbari Ram. The money value of the subject-matter in dispute in appeal is therefore clearly Rs. 5,559, so far as the respondents before us are concerned, and the provision of the Court-fees Act. relied upon by the appellants' counsel has no application to this case. We therefore hold that the appellants should have filed an *ad valorem* Court-fee calculated on Rs. 5,559, and we direct that the deficiency in the Court-fee be made good on or before the 9th of this month, failing which this appeal shall stand dismissed with costs.

No. 87.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

SUNDAR DAS AND OTHERS—(DEFENDANTS)—
PETITIONERS

Versus

MUSSAMMAT NARAIN DEVI AND OTHERS—
(PLAINTIFFS)—RESPONDENTS.

Civil Revision No. 3454 of 1910.

Revision of an order admitting a suit in formâ pauperis—not admissible.

Held, that no revision lies to the Chief Court from an order admitting a suit in formâ pauperis.

Muhammad Ayub v. Muhammad Mahmud (1), followed.

99 P. R. 1882 (*Sheikh Muhammad Mubarik v. Sheikh Fazl Ilahi*) (2), referred to.

Petition under section 70 (a) of Act XVIII of 1884 for revision of the order of the District Judge, Amritsar, dated the 15th November 1910.

Gobind Das for petitioners.

Brij Lal and Radha Kishen for respondents.

The judgment of the learned Chief Judge was as follows :—

4th April 1912.

SIR ARTHUR REID, C. J.—This is an application under section 70 (1) (a) of the Courts Act for revision of an order admitting a suit in *formâ pauperis*. In reply to a preliminary objection that revision does not lie the pleader for the petitioners cited 99 P. R. 1882 (*Sheikh Muhammad Mubarik v. Sheikh Fazl Ilahi*) (1), in which it was held that an inquiry whether a plaintiff was or was not a pauper was a judicial proceeding, and that an order refusing permission to appeal in *formâ pauperis* was revisable under section 622 of the Code of Civil Procedure on the application of the person against whom the question was decided.

Counsel for the respondents cited *Muhammad Ayub v. Muhammad Mahmud* (2), in which it was held that there was a clear distinction between the case of an application for permission to sue in *formâ pauperis* being rejected and the case of a similar application being allowed, inasmuch as the former decided the case and the latter was interlocutory and that, as the case must have been decided before the High Court could interfere in revision, an order granting an application for permission to sue in *formâ pauperis* was not revisable.

The case before the Division Bench of this Court in 99 P. R. 1882 (*Sheikh Muhammad Mubarik v. Sheikh Fazl Ilahi*) (1) above cited, was one in which permission was refused and I am, in my opinion, at liberty to follow the Allahabad ruling, which I approve in this case, in which permission has been granted. For these reasons I hold that revision does not lie and I dismiss this application with costs.

Petition dismissed.

(1) 99 P. R. 1882.

(2) (1910) I. L. R. 32 All. 623.

No. 88.

Before Hon. Mr. Justice Robertson.

**H. H. THE MAHARAJA BRIJ INDAR SINGH OF
FARIDKOT—(PLAINTIFF)—APPELLANT**

Versus

BANSI LAL—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 122 of 1912.

Custom—adoption—of sister's son—valid among non-agricultural Banias—Delhi District—Hindu Law—Succession by such adopted son to occupancy holding—Punjab Tenancy Act, XVI of 1887, section 59.

Held, that among non-agricultural Banias, Delhi District, adoption of a sister's son is valid.

24 P. R. 1900 (Harnaman v. Atma Ram) (1), 69 P. R. 1907 (Muhammad Din v. Jawahir) (2), 86 P. R. 1904 (Chuttan v. Ram Chand) (3), 99 P. R. 1909 (Mansa v. Surta) (4), and Bhagwan Singh v. Bhagwan Singh (5), referred to.

Held also, that such an adopted son succeeds to an occupancy holding of his deceased adoptive father under section 59 of the Punjab Tenancy Act.

34 P. R. 1883 (F. B.) (Dad v. Bhag Singh) (6), followed.

Further appeal from the decree of S. Clifford, Esquire, Additional Divisional Judge, Delhi Division, dated the 21st July 1911.

Muhammad Tufail for appellant.

Rambhaj Datta for respondent.

The judgment of the learned Judge was as follows :—

ROBERTSON, J.—The only question before me is whether or **11th April 1912.** not the adoption in this case of a sister's son is valid. Both Courts have found in favour of the validity of the adoption as a form of adoption amounting in the tract in question to an adoption, and not a mere appointment of an heir. That in the South-East Punjab such adoptions are often recognized is quite certain and I see no reason, after consulting the rulings quoted, for differing from the two lower Courts in their finding that the adoption of a sister's son was valid—(see 24 P. R. 1900 (*Harnaman v. Atma Ram*) (1), 69 P. R. 1907 (*Muhammad Din v. Jawahir*) (2), 86 P. R. 1904 (*Chuttan v. Ram Chand*) (3), 99 P. R. 1909 (*Mansa v. Surta*) (4), and *Bhagwan Singh v. Bhagwan Singh* (5)—as discussed and explained in these rulings.

It was not really contested in the first Court that if the adoption was a real adoption and not merely the customary appointment of an heir, the adopted son could succeed to the

(1) 24 P. R. 1900.

(2) 69 P. R. 1907.

(3) 86 P. R. 1904.

(4) 99 P. R. 1909.

(5) (1898) *I. L. R.* 21 *All.* 412 (P. C.).

(6) 34 P. R. 1883 (F. B.).

tenancy. It was contested in the grounds of appeal, but is not urged in the grounds for revision here, though the learned counsel argued the points. As to this, in face of 34 *P. R.* of 1883 (*Dad v. Bhag Singh*) (1), I see no ground to interfere specially as it is not specifically mentioned in the grounds raised under 70 (1) (b) nor was notice specifically issued on this point. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 89.

Before Hon. Mr. Justice Chevis.

HARNAM SINGH—JUDGMENT-DEBTOR—(DEFENDANT)—
APPELLANT

Versus

SALIG RAM—DECREE-HOLDER—(PLAINTIFF)—
RESPONDENT.

Civil Appeal No. 220 of 1911.

Civil Procedure Code, Act V of 1908, section 60—execution of decree—fine paid into Court in a criminal case against judgment-debtor, attachable after order inflicting fine has been set aside.

Held, that money paid into Court as a fine in a criminal case is, after the order imposing the fine has been set aside, attachable under section 60 of the Civil Procedure Code, as money belonging to the judgment-debtor.

Mothiar Mira Taragan v. Ahmatti Ahmad Pillai (2), referred to.

Miscellaneous further appeal from the order of W. A. LeRossignol, Esquire, Divisional Judge of the Hoshiarpur Division, dated the 26th November 1910.

Balwant Rai for appellant.

Beni Parshad Khosla for respondent.

The order of the learned Judge was as follows :—

22nd April 1912.

CHEVIS, J.—In a criminal case Harnam Singh was fined Rs. 75 or imprisonment in default; the fine was paid. Later on the conviction was set aside by this Court (see Criminal Revision 999 of 1909) and refund of fine was ordered. But before the money was actually refunded Salig Ram applied to have it attached in execution of his decree against Harnam Singh. The executing Court held that the money could not be attached until it had got back into the possession of the judgment-debtor, but on appeal the Divisional Judge has held that it is attachable, being money belonging to the judgment-debtor in the custody of a public officer.

(1) 34 *P. R.* 1883 (*F. B.*).

(2) (1905) *I. L. R.* 29 *Mad.* 232.

The judgment-debtor's counsel urges that the money did not again become the property of the judgment-debtor until it came again into his possession, or at the earliest, until he had obtained a refund certificate. I cannot agree. I am inclined to think that the order of a competent Criminal Court annulling the sentence made him again the owner with retrospective effect, so that he never ceased to be the owner at all. But granting that he ever ceased to be the owner, it is clear to me that he again became the owner as soon as the sentence was annulled. The issue of a refund certificate does not make him the owner; this is merely the procedure by which the money is repaid, and in itself conveys no ownership.

Counsel quotes no authority except *Mothiar Mira Taragan v. Ahmatti Ahmad Pillai* (1), which in my opinion does not help him at all; in that case it was held that the money attached had not become the property of the judgment-debtor for whom, as mortgagee, it had been paid into Court.

Counsel then wishes to argue that his client had no "disposing power", but it is unnecessary to go into this. Under section 60, Civil Procedure Code, money belonging to the judgment-debtor or over which he has a disposing power is liable to attachment. I find that the money did belong to the judgment-debtor at time of attachment, and this is all that it is necessary to decide.

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 90.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chervis.

NIAMAT ULLAH AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

MUSSAMMAT AISHA BIBI—(PLAINTIFF)—AND
MUSSAMMAT AIMNA BIBI—(DEFENDANT)—
RESPONDENTS.

Civil Appeal No. 606 of 1911.

Custom—succession—by daughter of the uncle of last male owner—Gujars—tahsil Kharian, district Gujrat.

Held, that the plaintiff (a daughter of the uncle of the last male owner) had failed to prove that, by custom among Gujars of *tahsil* Kharian, district Gujrat, she was entitled to succeed to certain ancestral house property on the death of the widow of the last male owner, and that the fact that she would

be so entitled under Muhammadan Law did not give her the *status* to contest an alienation of it made by the widow in possession.

134 P. R. 1907 (F. B.) (*Hamira v. Ram Singh*) (1), referred to.

Further appeal from the decree of C. L. Dundas, Esquire, Divisional Judge of the Rawalpindi Division, dated the 30th November 1910.

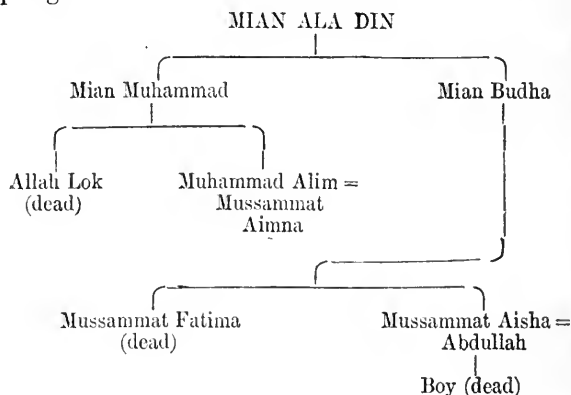
Fazal Hussain for appellants.

Ganga Ram for plaintiff-respondent.

The judgment of the Court was delivered by—

26th Feby. 1912.

SHAH DIN, J.—The parties are Gujars of *tahsil* Kharian of Gujrat District, and their relationship appears from the following pedigree :—



The property in suit is a house situate in Dingah which admittedly came down from Mian Ala Din to Muhammad Alim, the deceased husband of Mussammat Aimna, respondent No. 2. By a registered deed dated the 6th May 1909, this lady made a gift of the house, by way of charity, to the *Imam* of a mosque in Dingah known as the Barnianwali mosque. In June following the present suit was brought by Mussammat Aisha, daughter of Mian Budha, to obtain a declaration to the effect that the gift in question shall not affect her rights of reversion in the house gifted by Mussammat Aimna. The donors and the donees pleaded, *inter alia*, that the plaintiff was not an heir to Muhammad Alim, deceased, or to Mussammat Aimna, and that she had no *locus standi* to sue for the declaration prayed for. The first Court held that the plaintiff had no right of inheritance in the house in dispute, and on that ground it dismissed her suit. On appeal the Divisional Judge held that since in the absence of all other heirs Mussammat Aisha would succeed to the house in question on the death of Mussammat Aimna therefore she was an heir to her in respect of this house, and that as such heir she had a right to contest the gift in dispute which is one made by a widow with a limited estate. The learned Judge

has cited No. 19 P. R. 1906 (*Chiragh Bibi v. Hasan*) (1) and No. 135 P. R. 1908 (*Maqsud-ul-nisa v. Kaniz Zohra*) (2) in support of the latter view, and has decreed the plaintiff's claim.

The donees have preferred a further appeal to this Court, and before us two questions have been discussed in argument :—

- (1) Whether Mussammat Aisha is an heir to Muhammad Alim, deceased, as regards the succession to the house in dispute, and
- (2) Whether, if she is an heir, she being a female heir entitled to reversionary rights on the death of Mussammat Aimna, is empowered by custom to contest the validity of the gift of 1909.

With reference to the second question a number of authorities have been cited on both sides, reliance being placed by the appellant's counsel chiefly on No. 5 P. R. 1895 (*Sher Muhammad Khan v. Muhammad Khan*) (3) and No. 61 P. R. 1906 (*Nur-ul-nisa v. Gauhar-ul-nisa*) (4) and by the respondent's pleader on No. 19 P. R. 1906 (*Chiragh Bibi v. Hasan*) (1), No. 72 P. R. 1906 (*Lahori v. Radho*) (5), No. 135 P. R. 1908 (*Maqsud-ul-nisa v. Kaniz Zohra*) (2) and No. 60 P. R. 1910 (*Mussammat Kokan v. Mussammat Lakho*) (6). We do not, however, think it necessary to consider and decide this question as, in our opinion, the first question must be answered in the negative. It is not disputed that among the parties' tribe a daughter has no right of inheritance in her father's property as against his collaterals; and it is also admitted that plaintiff, Mussammat Aisha, has married outside the family. It was for the plaintiff, Mussammat Aisha, to prove that as the daughter of Muhammad Alim's uncle, she had by custom a right to succeed to the house in dispute on the death of his widow, Mussammat Aimna, and she has adduced no evidence whatever in support of such right of succession. On the principle enunciated in No. 134 P. R. 1907 (*F. B.*) (*Hamira v. Ram Singh*) (7) the plaintiff cannot, for purposes of succession to the house in dispute, be regarded as the grand-daughter of the common ancestor, Mian Ala Din; she must prove affirmatively that she is entitled to succeed as the first cousin of Muhammad Alim to the property left by him, and that his widow Mussammat Aimna is in possession of that property only on a life estate. Unless and until she establishes such a right of inheritance by custom, she cannot claim to possess a right of control in respect of alienations made by Mussammat Aimna in respect of the property in her possession

(1) 19 P. R. 1906.

(2) 135 P. R. 1908.

(3) 5 P. R. 1895.

(4) 61 P. R. 1906.

(5) 72 P. R. 1906.

(6) 60 P. R. 1910.

(7) 134 P. R. 1907 (*F. B.*).

as a widow of Muhammad Alim. Furthermore, for the purposes of the present litigation we cannot assume that Mussammât Aimna succeeded to the house in suit on the usual life estate as a widow, for that pre-supposes that there is in existence a reversionary heir who is entitled to succeed under custom to Muhammad Alim's property on the death or re-marriage of Mussammât Aimna. The plaintiff, Mussammât Aisha, has not shown that custom assigns to her the position of such reversionary heir. It follows, therefore, that on the one hand, Mussammât Aisha is not proved to be a reversionary heir of Muhammad Alim; nor, on the other hand, is Mussammât Aimna shown to have succeeded to a mere life estate in the house in dispute. It is undoubtedly true that in the absence of a definite rule of custom applying to the case in hand, Mussammât Aisha would, under her personal law, have succeeded to the house in suit on the death of Mussammât Aimna without heirs if the gift in dispute had not been made; but such right of succession under the Muhammadan Law does not confer on Mussammât Aisha the power to control an alienation by way of gift made by Mussammât Aimna in respect of the property in dispute. In order to possess such a power of control she must show that she has a right of succession to Muhammad Alim's property under custom, and in our opinion she has entirely failed to prove such right.

We accordingly accept the appeal and reversing the decree of the Lower Appellate Court, we restore that of the first Court with costs throughout.

Appeal accepted.

No. 91.

Before Hon. Mr. Justice Chevis.

HAFIZ ABDULLA KHAN—(PLAINTIFF)—APPELLANT

Versus

KANHAYA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 318 of 1912.

Civil Procedure Code, 1908, order 21, rule 2—decision by Executing Court on objection that decree has been satisfied out of Court—res judicata—maintainability of regular suit—Limitation for objection—Indian Limitation Act, IX of 1908, article 174.

Held, that where, on an application for execution of a decree, the judgment-debtor objects within the 90 days prescribed in article 174 of the Limitation Act on the ground that he has satisfied the decree out of Court, and the Executing Court thereon goes into the question and decides it on the merits, the decision cannot be attacked in a regular suit.

16 P. R. 1910 (*Diwan Singh v. Amir Singh*) (1), distinguished.

Further appeal from the decree of J. P. Thompson, Esquire, Divisional Judge, Delhi Division, dated the 31st July 1911.

Gullu Ram for appellant.

Santanam for respondents.

The judgment of the learned Judge was as follows :—

CHEVIS, J.—On 13th February 1902 Khushal Chand (now 30th April 1912. represented by the defendants-respondents) got a decree against Abdulla for Rs. 1,607. Various sums were realized in execution. On 26th November 1909 the decree-holder applied for execution of the balance of the claim. Abdulla objected that he had paid off the balance by payment of Rs. 629, in cash and ornaments, and by executing a bond for Rs. 200. The decree-holder denied these allegations. The Executing Court enquired into the matter, taking evidence on both sides, and dismissed the objection holding that the alleged payments were not proved ; Abdulla appealed, but without success.

Abdulla has now brought a regular suit for a declaration that the decree has been fully satisfied by the above payments. The Lower Courts have thrown out the suit, holding that the matter has been finally settled in execution and that a regular suit does not lie.

Plaintiff's counsel relies on 16 P. R. 1910 (*Diwan Singh v. Amir Singh*) (1). I find, however, that that ruling is distinguishable from the present case. I have got out the records from the Record Room of this Court and I find that in that case the question of the disputed payments was not gone into by the Executing Court at all, the payments not having been certified by the decree-holder, and the judgment-debtor not having applied within due time (*i.e.*, 90 days, *vide* article 174, 2nd schedule, Limitation Act) as required by section 258, Civil Procedure Code (now order 21, rule 2). But in the present case the matter of the alleged payments was brought to the notice of the Executing Court in due time, and so the Court was able to go into the question, and it did go into the question and decided it on the merits. The judgment-debtor's attack on that decision, made by appeal to the Divisional Court failed, and that decision is now final and cannot be attacked in regular suit, the matter in dispute being *res judicata*.

I dismiss this appeal with costs.

Appeal dismissed.

No. 92.

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice
Scott-Smith.*

SHAHAB DIN AND OTHERS—(DEFENDANTS)—
APPELLANTS

Versus

MUSSAMMAT PANAH BIBI AND OTHERS—
(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 113 of 1909.

Indian Registration Act, III of 1877, section 17—whether usual widow's estate amounts to a "right, title or interest in land."

Held, that among agricultural tribes in the Punjab the right of a widow of a proprietor to hold her deceased husband's land amounts to a "right, title or interest in the land" within the meaning of section 17 of the Registration Act and consequently an agreement relinquishing that right, where the value of it exceeds Rs. 100, requires registration.

Nilara Kom Rachappa v. Rudraya Bin Rachappa (1) and *Kalpagathachi v. Ganapathi Pillai* (2).

Further appeal from the decree of W. Malan, Esquire, Additional Divisional Judge, Sialkot Division, dated the 13th January 1909.

Appellants, in person.

Respondents, in person.

The judgment of the Court was delivered by—

4th May 1912.

SHAH DIX, J.—The facts are briefly these. The plaintiff-respondent, Mussammat Panah Bibi, brought a suit against the defendants-appellants, who are the collaterals of her deceased husband, for possession of 295 *kanals*, 14 *marlas* of land left by him. It was pleaded by the defendants, *inter alia*, that the plaintiff had relinquished her life estate in the land in suit by an agreement dated the 19th April 1905 which she had executed in favour of the defendants and that therefore her suit was not maintainable. The agreement in question is an unregistered one, and on behalf of the plaintiff it was urged that, as its registration was compulsory under section 17 of the Registration Act, it was inadmissible in evidence against her as regards her claim to the land in dispute. The Subordinate Judge accepted that contention and decreed the claim; and on appeal the Additional Divisional Judge agreed in the view taken by the Subordinate Judge as to the agreement of 1905 being compulsorily registrable and maintained his decree. The sole question for decision in the present appeal is whether the agreement, relied upon by the defendants, did or did not require

(1) (1875) 12 *Bom. II. C. R.* 141.

(2) (1880) *I. L. R.* 3 *Mad.* 184.

registration ; and on this point we have no hesitation in agreeing with the Courts below. It is not disputed that the value of the limited estate in the land in dispute, which the plaintiff-respondent became entitled to on the death of her husband, was more than Rs. 100, and all that we are called upon to decide in this appeal is whether the customary estate possessed by the widow in this case, namely, the right to hold possession of the land left by her husband till death or remarriage, amounts to " a right, title or interest " in the said land within the meaning of section 17 of the Registration Act. It is clear that, according to the Customary Law by which the parties are governed, the plaintiff on the death of her husband acquired a right to take possession of the land left by him, and which is now in dispute, and to keep possession of the same for her life, provided that she did not remarry ; and this right of the plaintiff to remain in possession of the land till death or remarriage was in our opinion, none the less " a right, title or interest " to or in the said land because it was acquired by her in lieu of her right of maintenance out of the estate of her deceased husband. In certain circumstances, well defined by Customary Law, a widow in the position of the plaintiff has power to alienate the immoveable property which has come to her from her deceased husband, and this power clearly implies that she possesses a definite right in the property of her deceased husband which is an extension of a mere right of maintenance out of that property. Among agricultural tribes in this Province the right of the widow of a proprietor has grown from a right to maintenance into a right to hold her deceased husband's land, and this latter right is clearly a vested right or interest to or in her husband's land which the widow acquires on his death.

The two decisions which were relied upon by the defendant's counsel in the Lower Appellate Court are clearly distinguishable from the present case. In *Nilava Kom Rachappa v. Rudraya Bin Rachappa* (1), the document in question was one in the nature of a family arrangement and was drawn up mainly for the purpose of settling a widow's maintenance, though some right in immoveable property was created or declared by the instrument. It was proved that the actual value of the whole of the immoveable property mentioned in the document exceeded Rs. 100, but there was no evidence to shew that the value of the widow's right exceeded that sum. Upon those facts it was held that for the purpose of registration under Act XX of 1866, the actual value of the

whole immoveable property named in the document must not be taken to be the value of the right so created or declared. That decision obviously has no bearing on the question before us, as in the present case it is not denied that the value of the plaintiff's estate dealt with by the agreement of 1905 exceeded Rs. 100. The second case is that of *Kalpagathachi v. Ganapathi Pillai* (1). All that was held in that case was that a widow's right to maintenance constituted no interest, vested or contingent, in the immoveable property of an undivided Hindu family within the meaning of the Registration Act, XX of 1866, and that a release thereof did not require to be registered under clause 2, section 17 of that Act. The deed of release in that case did not affect immoveable property at all, as the widow had a bare right of maintenance out of the joint funds of the family without any charge being created in respect of it on the family estate. Speaking of the nature of a widow's rights as against the male members of a joint Hindu family, the learned Judges say at page 191 of the report.—“She is entitled to sustenance according to the means of the family. She is competent to have her claim made a specific charge on a particular property, but so long as it has not been reduced to certainty by a legal transaction, she has a mere equity to a provision. We hold that this constitutes no interest, vested or contingent, in the immoveable property within the meaning of the Registration Act. It is rather a mere possibility and resembling the claim of a wife during the life-time of her husband as described in *Subramania Mudaliar v. Kaliyanni Ammal* (2). The wife, like the widow, is entitled to sustenance from the family property, but something more is necessary to enable her to claim a separate provision with a specific charge on particular property. We have already seen that the family debts take precedence of a claim to maintenance, and a creditor is also competent by taking certain steps to have his claim paid out of or secured on the property. His receipt, therefore, would also operate to extinguish a claim capable of being made a charge and a possible interest in the immoveable property, but the interest would not be specific. It would be an interest which, to use the words of Phear, J., has “no definite existence.” It seems to us that this widow's receipt differs very little from that of a creditor, and that she had no specific interest, vested or contingent, as was intended by the Registration Act.”

Both the Bombay case and the Madras case are thus distinguishable from the case before us, and for the reasons stated

(1) (1880) *I. L. R.* 3 *Mad.* 181.

(2) (1873) 7 *M. H. C. R.* 226 (228).

above, we hold that the agreement of the 19th April 1905 executed by Mussammat Panah Bibi in favour of her husband's collaterals, relinquishing her life estate in the land in suit, required registration and not being registered is inadmissible in evidence. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

No. 93.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

NIADAR MAL—(PLAINTIFF)—APPELLANT

Versus

COL. S. T. BIDDULPH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 1257 of 1911.

Civil Procedure Code, order 21, rule 48 (3)—whether Government can be made liable for amounts left unattached under order of attachment on the salary of a Government Officer, without being a party to the proceedings.

Held, that when, in execution of a decree, an attachment order has been made on the pay of a Government officer and the order has not been complied with in full or in part, no order can be made against Government under order 21, rule 48 (3), Civil Procedure Code, before Government is on the record.

Held also, that the rule merely gives a decree-holder a remedy against Government, and leaves him to prosecute that remedy in due course.

10 P. R. 1910 (*Oakes & Co. v. Discarcie*) (1), referred to and explained.

Further appeal from the order of Col. G. C. Beadon, Divisional Judge, Ambala Division, dated the 13th June 1911.

Lajpat Rai for appellant.

Respondent in person.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The appellant's case is that the decree-holders, including himself, were entitled to attachment of half the pay of the debtor and that, inasmuch as less than half was attached and consequently available for payment to the decree-holders, Government is liable under the last part of order XXI, rule 48 (3) of the Code of Civil Procedure for any sum paid to the debtor in excess of half his pay, and it has been contended that, on an application by which the debtor alone is impleaded, money (property of Government) may be attached in the treasury in satisfaction of so much of the debt as is still due to the appellants and is not in excess of the sum wrongfully

7th May 1912.

paid by Government to the debtor. It appears that the debtor retired from the Army on the 4th February 1910, his last pay certificate being up to the 2nd February, and this application was made on the 31st August 1910.

Reliance has been placed on a dictum in 10 P. E. 1910 (*Oakes & Co. v. Discarcie*) (1), that in accordance with the provisions of order XXI, rule 48 (3) of the Code, the Court should, when a Commanding Officer refuses to comply with the order of attachment on the pay of an officer, proceed to recover from Government for the benefit of the decree-holders the sums which should have been stopped out of the judgment-debtor's pay and remitted to the Court by the officer authorised to disburse the judgment-debtor's pay, leaving Government to settle up as it pleases with its officer, the judgment-debtor. This dictum does not, in my opinion, mean that an order can be made against Government before Government is on the record, and the rule relied on merely gives a decree-holder a remedy against Government and leaves him to prosecute that remedy in due course.

I concur with the Lower Appellate Court that Government was a necessary party to the application and to the appeal, and that the Lower Appellate Court was bound to dismiss the appeal as barred by limitation so far as Government was concerned. The debtor was admittedly merely a formal party and no remedy was sought against him.

The appeal fails and is dismissed. No costs to the respondent, who is unrepresented.

Appeal dismissed.

No. 94.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Scott-Smith.

NAND LAL—(PLAINTIFF)—APPELLANT

Versus

GOOJAR AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 864 of 1910.

Indian Limitation Act, 1908, articles 135 and 144—mortgage by conditional sale—suit for possession as owner where foreclosure proceedings were not taken till after expiry of 12 years from date fixed for payment of mortgage money.

Held, that a mortgagee under a deed of conditional sale, who has not taken foreclosure proceedings under Regulation XVII of 1806 within 12 years

of the date fixed in the deed for payment of the mortgage money, is barred by limitation when suing for possession as an owner.

35 P. R. 1899 (*Moman v. Ishri Pershad*) (1), followed.

90 P. R. 1895 (*Bhandari v. Mussammat Jasodhan*) (2) and 57 P. R. 1908 (*Nagar v. Saudagar*) (3), distinguished.

Further appeal from the decree of M. L. Waring, Esquire, Divisional Judge, Jullundur Division, dated 22nd February 1910.

Mool Chand for appellant.

Balwant Rai for respondents.

The judgment of the Court was delivered by—

SCOTT-SMITH, J.—The question for decision by the Division Bench is given in the order of the Judge who referred this case dated the 17th May 1911. Briefly the question is whether a mortgagee under a deed of conditional sale, who has not taken foreclosure proceedings under Regulation XVII of 1806 within 12 years of the date fixed in the deed for payment of the mortgage-money, is barred by time when suing for possession as an owner. The Judge who referred this case found some conflict between the rulings reported as 90 P. R. 1895 (*Bhandari v. Mussammat Jasodhan*) (2) and 35 P. R. 1899 (*Moman v. Ishri Pershad*) (1) on the one hand and 57 P. R. 1908 (*Nagar v. Saudagar*) (3) on the other. 8th May 1912.

In the 1895 case it was held that the plaintiff's suit was within time as he had taken foreclosure proceedings according to the Regulation within 12 years of the due date. The case is therefore distinguishable from the present.

The case reported as 35 P. R. 1899 (*Moman v. Ishri Pershad*) (1) is on all fours with the present case. In that case the suit, not having been instituted within 12 years of the date fixed on the mortgage-deed for payment of the mortgage-money, was held to be barred by limitation either under article 135 or article 144 of the Second Schedule of the Limitation Act.

In 57 P. R. 1908 (*Nagar v. Saudagar*) (3), the head-note is that there is no time limit for the foreclosure of the mortgage by conditional sale, and the mortgagee in possession is entitled to take out such proceedings at any time during the subsistence of his mortgage. The important words to be noted in this are "the mortgagee in possession."

In the present case the mortgagee was entitled to immediate possession from the date of the mortgage, but the Lower

(1) 35 P. R. 1899.

(3) 57 P. R. 1908.

(2) 90 P. R. 1895.

Courts have concurred in holding that he never took possession under the mortgage, and as this is an appeal under section 70 (1) (b) of the Punjab Courts Act, we are precluded from questioning the finding of fact. In the 1908 ruling the Judges were careful to distinguish 35 P. R. of 1899 (*Moman v. Ishri Pershad*) (1) by saying that “no question arises in the present case as to the suit being barred under article 135 as it is not a suit for possession”. That was a suit for declaration that plaintiffs-mortgagees, who had all along been in possession, were absolute owners by reason of foreclosure. The present case is distinguishable from it. 35 P. R. 1899 (*Moman v. Ishri Pershad*) (1) was followed in Civil Appeal No. 915 of 1906 and also in No. 792 of 1905. We see no reason to dissent from the views expressed in the above quoted rulings and we, therefore, dismiss the appeal with costs without calling upon respondent’s pleader to reply.

Appeal dismissed.

Full Bench.

No. 95.

*Before Hon. Mr. Justice Robertson, Hon. Mr. Justice Rattigan
and Hon. Mr. Justice Shah Din.*

GANESHA AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

MUL CHAND AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 43 of 1911.

Civil Procedure Code, 1908, schedule II, para. 1 and order 32, rule 7—application to submit to arbitration by guardian or next friend of a minor—necessity of express sanction by Court—Civil Procedure Code, 1882, sections 506 and 462.

Held, that an application of the guardian or next friend of a minor under section 506 of the former Code of Civil Procedure or under Schedule II, para. 1 of the present Code, comes within the purview of section 462 of the former Code or order 32, rule 7 of the present Code as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court, expressly recorded in the proceedings.

37 P. R. 1895 (*Hira v. Dina*) (2), followed.

Hardeo Sahai v. Gauri Shankar (3), 4 P. R. 1907 (*Uda v. Mul Chand*) (4), and *Annanda Krishna Dey v. Jogendra Nath Dey* (5), differed from.

(1) 35 P. R. 1899.

(2) 37 P. R. 1895.

(3) (1905) I. L. R. 28 All. 35.

(4) 4 P. R. 1907.

(5) (1908) 8 Cal. L. J. R. 294.

Lakshmana Chetti v. Chinnathambi Chetti (1), 18 P. R. 1891 (F. B.) (*Malak Sorab v. Anokh Rai*) (2), *Shco Nath Saran v. Sukh Lal Singh* (3), *Chengal Reddi v. Venkata Reddi* (4), 3 P. R. 1905 (*Ghulam Ali Shah v. Shahabal Shah*) (5), and 3 P. R. 1912 (*Badri Das v. Santa Singh*) (6), referred to.

Further appeal from the decree of T. P. Ellis, Esquire, Additional Divisional Judge, Ferozepore Division, dated 2nd August 1909.

Lajput Rai for appellants.

Sukh Dial for respondents.

RATTIGAN, J.—The question referred to the Full Bench is 18th May 1912.
as follows:—

“When a guardian *ad litem* of minor defendants applies “under section 506 of the former Code, or under schedule “2, para. 1 of the present Code of Civil Procedure in a “pending suit for an order of reference to arbitration, is “it essential for the validity of any such reference that “the Court should in express terms sanction the reference “under section 462 of the former Code or under order 32, “rule 7 of the present Code.”

This is a question of some little difficulty and I confess that at one time I inclined to the opinion that the answer to it should be in the negative. After more careful consideration however, and in view of the arguments urged before us, especially by Mr. Lajpat Rai, I have come to a somewhat different conclusion. My opinion now is that both in cases governed by the provisions of the Code of 1882 and in cases governed by the provisions of the present Code the guardian *ad litem* of a minor defendant, and I might add, the next friend of a minor plaintiff must obtain the express sanction of the Court, if he wishes, on behalf of his ward, to refer the matter in dispute or any question involved in the suit to arbitration, and that an omission on the part of such guardian or next friend to obtain such sanction will have the effect of making all proceedings consequent on such reference *voidable* against all parties other than the minor. In other words, I hold that an application of the guardian or next friend under section 506 of the former Code, or under schedule 2, para. 1 of the present Code comes within the purview of section 462 of the former Code or order 32, rule 7 of the present Code, as the case may be, and that unless the leave of the Court is expressly obtained

(1) (1900) I. L. R. 24 Mad. 326.

(2) 18 P. R. 1891 (F. B.).

(3) (1899) I. L. R. 27 Cal. 229.

(4) (1889) I. L. R. 12 Mad. 483.

(5) 3 P. R. 1905.

(6) 3 P. R. 1912.

and recorded, the application to refer will have the same effect, and be open to the same objections, as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings. I give my answer in these terms because the question put to us is not, I think, very satisfactorily expressed. The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be *valid* for all purposes and against all parties including the minor, but it does not follow that in a case where such sanction has not been obtained, the reference must necessarily be invalid or void. The minor alone can claim to avoid it (though No. 3 P. R. 1905 (*Ghulam Ali Shah v. Shahabul Shah*) (1) and No. 3 P. R. 1912 (*Badri Das v. Santa Singh*) (2) are authorities for the proposition that in certain cases his suit may be unsuccessful) but it is of course open to him, if so advised, to affirm and ratify the reference and all subsequent proceedings.

There is a singular dearth of authority upon the question before us and practically the only direct decision upon it is that of a Division Bench of this Court, reported as No. 37 P. R. 1895 (*Hira v. Dina*) (3) and even in that case there is no discussion of the question. The learned Judges simply followed an *obiter dictum* in the judgment given by Sir Meredyth Plowden, J. in No. 18 P. R. 1891 (F. B.) (*Malak Sorab v. Anokh Rai*) (4) and upon its authority held that "the reference to arbitration is an agreement" with reference to the suit "within the meaning of section 462" of the Code of 1882 and that the guardian was not authorized to enter into it without the leave of the Court which must be given in express terms.

In *Lakshmana Chetti v. Chinnathambi Chetti* (5) there is an expression of opinion to the same effect, while, on the other hand, we have certain *dicta, per contra*, in *Hardeo Sahai v. Gauri Shunkar* (6), 4 P. R. 1907 (*Uda v. Mul Chand*) (7) and *Annanda Krishna Dey v. Jogendra Nath Dey* (8).

I have given these opinions, which are of course entitled to every weight, my best consideration, and the conclusion

(1) 3 P. R. 1905.

(2) 3 P. R. 1912.

(3) 37 P. R. 1895.

(4) 18 P. R. 1891 (F. B.).

(5) (1900) I. L. R. 24 Mad. 326.

(6) (1905) I. L. R. 28 All. 35.

(7) 4 P. R. 1907.

(8) (1908) 8 Cal. L. J. R. 294.

at which I have arrived is, as expressed in No. 37 P. R. 1895 (*Hira v. Dina*) (1), that the reference to arbitration is an agreement with reference to the suit and as such within the purview of the general provisions of law embodied in section 462 of the former Code and order 32, rule 7 of the present Code. The reference to arbitration under section 506 of the Code of 1882 or under the first para. of the 2nd schedule to the present Code unquestionably has "reference to the suit," for it is only matters in difference in the suit that can be so referred to arbitration through the Court. Then, is the application preferred to the Court by the parties an "agreement"? Obviously it is so, for it is only when all the parties agree to make such reference that the application can be entertained, and the application must be preferred by them all. In the present Code this point has been made quite clear, para. 1 of the 2nd schedule providing that where in any suit all the parties interested "*agree*" that any matter in "difference between them," etc., the Court shall, etc. Section 506 of the former Code was not so explicit. It provided that "if all parties to a suit *desire* that any matter in difference between them in the suit be referred to arbitration," the Court shall, etc. But I do not think that there has been any change in the law. Before all the parties can apply to the Court for an order of reference, it is clearly necessary that they should have *agreed inter se* to refer the matters in dispute to arbitration and their joint application necessarily presupposes an agreement between them. In all these cases therefore (1) there is an agreement between the parties and (2) such agreement has reference to the pending suit. Upon what ground then, can it be urged that the wide and general provisions of section 462 of the Code of 1882 or of order 32, rule 7 of the present Code are inapplicable? Those provisions were enacted for the protection of minors who are unable to look after their own interests and to whom the Court stands in a *quasi* tutelary position. Is then the Court, to which in all other cases an agreement or compromise with reference to the suit, made by a guardian, a next friend, has to be submitted for sanction, bound in cases, such as the present, to allow the guardian or next friend to refer the matters in dispute to any arbitration selected by the parties? And if it does so simply as a matter of course and without regard to the interests of the minor, is the latter to be held bound by the award of the arbitrator or arbitrators? Or, has

the Court power to refuse to make such reference when it is of opinion that the questions involved, or the persons nominated as arbitrators, are such that it would be prejudicial to the interests of minors, who cannot look after their own interests, to permit the reference? The general policy of the law no less than the language of the relevant sections of the Code clearly imply that such agreements to refer must, to be absolutely binding on the minor, be sanctioned in express terms by the Court. Parties to a suit who are of age must be left to look after their own interests, and if they enter into an agreement or compromise, or if they decide to refer their dispute to arbitration, the Court has no further concern in the matter. But unfortunately guardians and next friends of minors are not invariably honest, and even if honest, are sometime careless and occasionally lacking in intelligence, and the duty of safeguarding the interests of minors, so far as is practicable, is therefore thrown upon the Courts. Bearing this in mind I can find no justification for the view that the Courts are precluded from exercising this duty where the guardian or next friend appears and states that he has agreed with the other party to make a reference to arbitration, and this too though the matter in dispute may be wholly unsuitable for such reference or the arbitrator nominated may be quite unfit.

In arriving at this conclusion I am not unmindful of the cases in which it has been held that the express sanction of the Court is not needed when a guardian or next friend of a minor agrees, on his behalf, to be bound by the oath of the other party to the suit (No. 18 P. R. 1891 (*F. B.*) (*Malak Sorab v. Anokh Rai*) (1), *Sheo Nath Saran v. Sukh Lal Singh* (2) and *Chengal Reddi v. Venkata Reddi* (3)). Speaking with every deference I must confess that I find some difficulty in following the *ratio decidendi* of these cases or in fully appreciating the subtle distinction between them and the class of case with which we are dealing. It seems to me that the High Court of Allahabad was justified in remarking, that if section 462 does not apply to those cases, *a fortiori* it would not apply to the proceedings taken under Chapter XXXVII of the Code of 1882 (*Hardeo Sahai v. Gauri Shunker*) (4). However Sir Meredyth Plowden was of the opposite opinion (see No. 18 P. R. 1891) (*Malak Sorab v. Anokh Rai*) (1) and I need say no more with reference to

(1) 18 P. R. 1891 (*F. B.*).

(2) (1899) I. L. R. 27 Cal. 229.

(3) (1889) I. L. R. 12 Mad. 483.

(4) (1905) I. L. R. 28 All. 35 (37).

these cases than that the actual question then involved is not now before us, and we are not called upon to decide as to the correctness or otherwise of the proposition there laid down.

For the reasons given I would reply to this reference in the terms I have stated above.

ROBERTSON, J.—I concur with my brother Rattigan.

22nd May 1912.

Section 462 of the Civil Procedure Code of 1882 runs as follows:—

“No next friend or guardian for the suit shall, without the leave of the Court, enter into any agreement or compromise on behalf of a minor, with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise entered into without the leave of the Court shall be voidable against all parties other than the minor.”

It is quite clear that a reference to arbitration requires an agreement to refer to arbitration, and that such an agreement has reference to the suit. Such an agreement therefore comes within the purview of section 462 of the Code of 1882 and of order 32, rule 7 of the present Code. I have nothing to add to what has been written by my brother Rattigan.

SHAH DIN, J.—I agree in the answer to the reference as proposed by my brother Rattigan.

23rd May 1912.

No. 96.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

RADHA KISHAN AND OTHERS—(DEFENDANTS)—
PETITIONERS

Versus

KIDAR NATH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 501 of 1911.

Jurisdiction—evidence taken before a Munsiff in suit for dissolution of partnership, who subsequently finds that he has not jurisdiction to try the case, whether admissible in Court of competent jurisdiction.

Held, that where in a suit for dissolution of partnership, the Munsiff trying the case, after issuing a commission to examine the account books, finds that the value of the suit exceeds his jurisdiction, the proceedings before him are *coram non jure* so far as the eventual decision of the question of the indebtedness of one party to the other is concerned, and that the Sub-Judge before whom the case came subsequently, was justified in declining to receive the report of the Commissioner as evidence in his Court.

Prabhakarbhat v. Vishwanbhar Pandit (1) and *Kalian Dayal v. Kalian Narer* (2), followed.

(1) (1884) *I. L. R.* 8 *Bom.* 313 (317, 318) (*F. B.*).

(2) (1884) *I. L. R.* 9 *Bom.* 259 (265).

Petition for revision of the order of Baba Mihan Singh, Bedi, Sub-Judge, 1st Class, Amritsar, dated 1st February 1911.

Shadi Lal and Sukh Dial, for petitioners.

Oertel, for respondents.

18th May 1912.

The judgment of the learned Chief Judge was as follows :—
SIR ARTHUR REID, C. J.—This is an application for revision of an order refusing to include in the evidence before the Court below evidence recorded by the Munsif with the object of deciding whether the suit was cognizable by him. A preliminary objection was taken that no revision lay, the alleged error being on a question of law and being moreover an interlocutory order from which an appeal would lie on appeal from decree. 4 P. R. 1911 (*Sardar Arur Singh v. Bua Ditta*) (1), 20 P. R. 1911 (*Sardar Arur Singh v. Dayal Singh*) (2) and 82 P. R. 1911 (*Mir Umar Ali v. Mussammatt Nasib-un-Nissa*) (3), were cited.

For the petitioner 60 P. R. 1897 (*F. B.*) (*Pandit Rama Kant v. Pandit Ragdeo*) (4) and Civil Revision No. 1006 of 1909 were cited for the proposition that an erroneous refusal to admit evidence was a material irregularity and that unless the petitioner's remedy was granted at once, the Court below would proceed to record fresh evidence in place of that recorded by the Munsif and remedy by appeal from decree would be too late. This is possibly a case in which the remedy is by revision at this stage, but in my view of the correctness of the order attacked the respondent will lose nothing by the decision that revision lies.

The suit instituted in the Munsif's Court was for dissolution of partnership and for such sum as might be found due on dissolution. The Munsif had to decide whether the suit was within his jurisdiction and for this purpose he issued a commission for the examination of account books. There was no question of under or over valuation in his Court. The valuation was tentative only. 16 P. R. 1908 (*F. B.*) (*Muhammad Afzal Khan v. Nand Lal*) (5), and 46 P. R. 1906 (*Manna Lal v. Samandu*) (6), are ample authority for holding that it was the duty of the Munsif, on finding that the value of the suit exceeded his jurisdiction, to return the plaint for presentation in a competent Court. Inasmuch as the Munsif decided that he had not jurisdiction, he could not proceed to decide any point other than that of jurisdiction, and no finding by him that a certain amount was due by one party to the other can be treated as a

(1) 4 P. R. 1911.

(2) 20 P. R. 1911.

(3) 82 P. R. 1911.

(4) 60 P. R. 1897 (*F. B.*).

(5) 16 P. R. 1908 (*F. B.*).

(6) 46 P. R. 1906.

finding, on the merits. The proceedings before him were *coram non judice* so far as the eventual decision of the question of the indebtedness of the one party to the other one was concerned, and the order of the Lower Court attacked by the petitioner was correct. This view is supported by *Prabhakarbhat v. Vishwambhar Pandit* (1), and by *Kalian Dayal v. Kalian Narer* (2). I decline to refer this case to a Division or a Full Bench for a consideration of the respective correctness of 16 P. R. 1908 (F. B.) *Muhammad Afzal Khan v. Nand Lal* (3), and *Sudarshan Das Shastri v. Ram Prasad* (4), as I see no reason for holding that the former is incorrect and the latter correct.

The application is dismissed with costs. This judgment governs Civil Revisions Nos. 646 and 647 of 1911.

Application dismissed.

No. 97.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

JUMA AND OTHERS—(DEFENDANTS)—APPELLANTS
Versus
MUBARAK KHAN AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 853 of 1910.

Civil Procedure Code, 1908, section 105 (1)—order setting aside award of arbitrators, though not appealable, may be attacked in appeal from the decree.

Held, that an order setting aside an award of arbitrators, though not appealable, may be attacked in the appeal from the decree in the case, *vide* section 105 (1), Civil Procedure Code, 1908.

72 P. R. 1881 (*Sher Jung v. Maihun*) (5), and *Achuthayya v. Thimmayya* (6), followed.

Ganga Prasad v. Kura (7), dissented from.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Mullan, dated 12th April 1910.

Shah Nawaz, for appellants.

Fazal Elahi, for respondents.

(1) (1884) I. L. R. 8 Bom. 313 (317, 318) (F. B.).

(2) (1884) I. L. R. 9 Bom. 259 (265).

(3) 16 P. R. 1908 (F. B.).

(4) (1910) I. L. R. 33 All. 97.

(5) 72 P. R. 1881.

(6) (1908) I. L. R. 31 Mad. 345.

(7) (1906) I. L. R. 28 All. 408.

The judgment of the Court was delivered by—

21st May 1912.

ROBERTSON, J.—

* * * *

As regards the 2nd point, however, we think that the Lower Appellate Court was wrong in holding that no appeal lay from the order of the District Judge attributing misconduct to the arbitrators and setting aside the award. No doubt there have been conflicting opinions expressed by the High Courts upon this point. In *Ganga Prasad v. Kura* (1), it was decided that no appeal lay from an order of the first Court setting aside an award of arbitrators on the ground of misconduct. This view was dissented from in a later judgment by a Bench of the Madras High Court reported as *Achuttayya v. Thimmayya* (2). We are inclined ourselves to take the view that the decision of the Madras High Court is the correct one. We find, however, that the point has been actually before two Benches of this Court, the judgment of the last of which is reported as 72 P. R. 1881 (*Sher Jang v. Maikhun*) (3). That no doubt was a decision based on section 591 of the Code of Civil Procedure, 1877. The Madras ruling was under section 591 of the Code of Civil Procedure of 1882. These sections are identical in the two Codes. Section 105 of the Code now in force, paragraph 1, differs in no material particular from section 591 of the Codes of 1877 and 1882. In 72 P. R. 1881 (*Sher Jang v. Maikhun*) (3), it was clearly held, following a previous judgment of this Court (59 P. R. 1875 (*Mussummat Bhoi v. Sher Baz Khan*)) (4), that an appeal does lie from an order setting aside the award of arbitrators when the whole decree is appealed against though there is no such appeal from such an order as an interlocutory order. We must take it therefore as the view of this Court, from which we see no reason to differ, that when an appeal is finally preferred against a decree of a Court of first instance which Court has in the course of the suit set aside an award of arbitrators on the ground of misconduct, the order setting the award aside can be traversed in the appeal against the whole decree. For this reason we are constrained to hold that the order of the learned Divisional Judge to the following effect is incorrect:—“The first point, I may note, is the contention that “the order of the District Judge, finding misconduct on the part “of the original arbitrators is incorrect. No appeal lies against “an order of this description so that point cannot be considered.” An appeal did lie to his Court and he is bound to decide the point.

(1) (1906) I. L. R. 28 All. 408.

(2) (1908) I. L. R. 31 Mad. 345.

(3) 72 P. R. 1881.

(4) 59 P. R. 1872.

We accordingly set aside the decree of the Lower Appellate Court and return the case to him for decision of the point against which he has held that no appeal lay. No other point in the case is to be re-opened. The learned Divisional Judge will decide this point and pass such order on the whole appeal as may become necessary from such decision. Costs will be costs in the cause.

Case remanded.

No. 98.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

MUSSAMMAT RAHMTAN AND OTHERS—(DEPENDANTS)—
APPELLANTS

Versus

FATEH MUHAMMAD AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 1104 of 1910.

Custom—alienation—will devising ancestral property by childless proprietor in favour of his sister in presence of collaterals in 6th degree—Kassars of mauza Mangalwal, tahsil Chakwal, district Jhelum—Riwaj-i-am.

Held, that by custom among Kassars of mauza Mangalwal, tahsil Chakwal in the Jhelum District, a childless proprietor can by will devise the whole of his ancestral property to his sister in presence of distant collaterals in the 6th degree.

48 P. R. 1903 (F. B.) (*Mussammat Bano v. Fateh Khan*) (1), 17 P. R. 1867 (*Khoda Dad v. Bukshum*) (2), 50 P. R. 1902 (*Haidar Khan v. Jahan Khan*) (3), 34 P. R. 1905 (*Hayat v. Hidayat*) (4), 107 P. R. 1893 (*Bakshi v. Rahim Dad*) (5) and 68 P. R. 1911 (*Lachhman v. Bhagwan Sahai*) (6), referred to.

Further appeal from the decree of C. L. Dundus, Esquire, Divisional Judge, Rawalpindi Division, dated the 6th July 1910.

Nanak Chand, for appellants.

Durga Das, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—The parties are Kassars of tahsil Chakwal in the Jhelum District, and the question before us is whether the will, whereby one Allah Dad, a childless proprietor, devised the whole of his ancestral property to his sister, Mussammat

30th May 1912.

(1) 48 P. R. 1903 (F. B.).

(2) 17 P. R. 1867.

(3) 50 P. R. 1902.

(4) 34 P. R. 1905.

(5) 107 P. R. 1893.

(6) 68 P. R. 1911.

Rahmtan, is valid in the presence of plaintiffs who are collaterals related to the testator in the 6th degree. The will was executed on the 24th September 1908 and the testator died some 5 or 6 months thereafter. His mother, Mussammat Gullan, is at present in possession for her life, and consequently plaintiffs seek merely a declaratory decree.

The Lower Courts are agreed that the will is invalid in the presence of plaintiffs and have, therefore, granted them the decree for which they prayed. Mussammat Rahmtan has preferred a further appeal to this Court and we have heard Mr. Nanak Chand on her behalf and Mr. Durga Das on behalf of respondents. As a result, we are unable to agree with the finding of the Courts below. The burden of proof was, no doubt, at the outset upon the appellant, and it was for her to show that the custom of the parties recognised the validity of alienations such as that now under discussion. But she has, in our opinion, been able to adduce evidence which has shifted the *onus probandi* from her to respondents, and the latter have failed to meet the case put up by her. In the first place, appellant relies upon the entry in the *Riwaj-i-am* of this village* prepared in 1880 which runs as follows :—

“ If an owner in his life time gift a portion or the whole of his property and give possession, he can do so ; but certainly no one has hitherto made a gift to his daughter or other person in the presence of sons.

“ As he can make a gift, so every one can make a will, but he rarely does so.”

The last answer is significant. In 1880 the idea of alienating property by will was probably novel, but we find it distinctly recognised, and since 1880 the practice has undoubtedly grown in favour, and the majority of the *F. B.* in No. 48 *P. R.* 1903 (*Mussammat Bano v. Fateh Khan*) (1), have laid it down as an undoubted proposition of Customary Law in this Province that the recognition of a power of alienation *inter vivos* justifies the conclusion that a power of alienating by will is equally recognised.

Next we have the *Riwaj-i-am* of 1901 as embodied in Talbot's Tribal Custom in the Jhelum District.

Question 89 at page 59 runs as follows :—

“ Can a father make a gift of the whole or any specific share of his property, moveable or immoveable, ancestral or acquired,

*[*Mauza Mangalwal*—Ed.]
(1) 48 *P. R.* 1903 (*F. B.*).

“to his daughter otherwise than as her dowry, to his daughter’s son, to his sister or her sons or to his son-in-law? Is his power in this respect altered if he have (1) sons, (2) near kindred and no sons? If the consent of the near kindred is essential to such gifts, state the degree of kindred towards him in which the persons must stand by whom such gifts can be prohibited?”

This is a very complicated and embarrassing question and it may be that the people to whom it was put, did not fully understand it with all its various parenthesis and sub-parenthesis. But the reply of the Musalman tribe of the Chakwal *tahsil*, the Talagang Awans and Khattris, is clear and definite: “self-acquired and moveable property may be given; but not ancestral property without the consent of the reversioners to the fourth degree.”

We see no reason to doubt that this answer was given with full understanding of the general question. “Can a proprietor make a gift of his ancestral estate?” The answer is “no, he cannot if there are reversioners within the fourth degree, unless he first obtains their consent.” The obvious inference from this is that the proprietor’s rights can be controlled only by reversioners who stand within the degree specified and not by others more distantly related.

In the third place we have a very early decision of this Court reported as No. 17 P. R. 1867 (*Khoda Dad v. Bukshum*) (1). In the reported judgment no reference is made to the tribe of the parties but we find from Mr. Talbot’s work (Appendix II, p. xxi) that they were Kassars of *tahsil* Chakwal. In this case a gift to a sister’s son was declared valid in the presence of collaterals. Again, in 1877 one Tora, a Kassar of this same *tahsil*, made a gift of his land to his sister’s son, Jahanra, and no objection was taken by the collaterals. Mutation was accordingly effected in favour of the donee. Then in the recent case of *Karm Bakhsh v. Mussammal Gulab Khatun* which was decided by the Munsif, 1st Class, Rawalpindi, on the 1st June 1909, and on appeal by the Divisional Judge, on the 6th June 1910, we find reference made in the judgment of the Munsif to a case “No. 15 of *manza* Sang, Jhelum District,” in which in 1865 a gift in favour of a sister’s son was upheld as valid, the parties being Kassars. The Divisional Judge in his judgment in *Karm Bakhsh’s case*, states that “several instances”

were given in the oral evidence adduced by defendants to establish the power of a sonless Kassar to alienate by will and he adds that those instances were not controverted. In that particular case itself a sonless Kassar had made a gift of his ancestral property, by will, in favour of his sisters and the gift was upheld upon the ground that the next reversioner had assented to it. The case is thus, of course, not directly in point, but it is relevant as showing the growing desire of persons of this tribe, who have no children of their own, to give their property to their sisters. On the other hand plaintiffs have not been able to point to a single instance in which a gift to a sister has been successfully challenged by collaterals related to the donor beyond the fourth degree. Nor have they been able to show that the consent of any such distant collateral has ever been obtained to a gift of that kind.

Mr. Durga Das has referred us to certain cases from the Jhelum District in which gifts to sisters or sister's sons have been declared invalid by the custom of (1) Muhammadan Mair Rajputs (No. 50 P. R. 1902 (*Haidar Khan v. Jahan Khan*) (1)) ; (2) Kathi Jats (No. 34 P. R. 1905 (*Hayat v. Hidayat*) (2)) and (3) Kainai Jats (No. 107 P. R. 1893 (*Bakshi v. Rahim Dad*) (3)). But we are unable to see the relevancy of these decisions to the question now before us, and in any event the instances referred to in the judgment reported as No. 68 P. R. 1911 (*Lachhman v. Bhagwan Sahai*) (4), (Kahats of *tahsil* Chakwal) may be set off against them.

In our opinion, appellant has been able to adduce sufficient evidence in support of the will to throw the *onus* upon the respondents of proving that a devise to her is invalid in the presence of collaterals related in the sixth degree, and they have failed to discharge this *onus*.

We accordingly accept the appeal and dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(1) 50 P. R. 1902.
(2) 34 P. R. 1905.

(3) 107 P. R. 1893.
(4) 68 P. R. 1911.

No. 99.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge.*HUKAM CHAND AND OTHERS—(JUDGMENT-DEBTORS)—
APPELLANTS*Versus*HAYAT AND OTHERS—(DECREE-HOLDERS)—
RESPONDENTS.

Civil Appeal No. 6 of 1910.

Civil Procedure Code, 1908, section 148—extension of period fixed in a decree for payment of a sum of money.

Held, that the general provisions of section 148 of the Civil Procedure Code, 1908, relate only to proceedings antecedent to the passing of a final decree and are not intended to give a Court power to alter the terms of a decree already passed, and that the period fixed in a decree for the payment of a certain sum of money consequently cannot be extended under this section.

Held also, that the Court passing the decree was *functus officio* as an original Court and that the general rule is that no executing Court can vary a decree except by consent of parties.

Bibi Sharafan v. Mahomed Habib-ud-din (1) and *Narendra Bahadur Singh v. Ajudhia Prasad* (2), followed.

*Further appeal from the order of Q. Q. Henriques, Esquire,
Divisional Judge, Shahpur, dated 30th October 1909.*

Nanak Chand for appellants.

Ganpat Rai for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The question for consideration is 8th June 1912.
whether section 148 of the Code of Civil Procedure empowers a Court to extend the period fixed by a decree passed on a compromise for the payment of a sum of money, as a condition for the cancellation of a lease, the penalty for the failure to pay within the period fixed being dismissal of the suit with costs. The Lower Appellate Court held that the period, which had expired before its enlargement was sought, could be enlarged. Counsel for the appellants has cited *Bibi Sharafan v. Mahomed Habib-ud-din* (1) and *Narendra Bahadur Singh v. Ajudhia Prasad* (2), as authority for the proposition that section 148 does not apply to periods fixed by a decree. In the *Calcutta Weekly Notes* case the judgment runs :—

“ We may add that at one stage of the proceedings we were
“ inclined to make an order for the reversal of the sale under
“ rule 89 of order 21 of the Code. We are unable to do so.

(1) (1911) 15 Cal. W. N. 685 (690).

(2) (1909) V Indian Cases, 443.

“ however, because under rule 92, sub-rule 2, the deposit must
 “ be made within thirty days from the date of sale, and we
 “ have no power, either under section 5 of the Limitation Act,
 “ or under section 148 of the Civil Procedure Code of 1908, to
 “ enlarge the time. We are therefore constrained to hold that
 “ the appeal to the District Judge was competent and that no
 “ grounds have been established for our interference with his
 “ order in the exercise of our revisional jurisdiction.” In
 the *Indian cases* case a Division Bench of the Oudh Judicial
 Commissioner’s Court, of whom one member has officiated in the
 Allahabad High Court, held that the general provisions of
 section 148 related only to proceedings antecedent to the passing
 of a final decree and were never intended to give a Court power
 to alter the terms of a decree already passed, the decree being
 unalterable, except under the provisions of section 152 or order
 XX, rule 3 or those relating to review of judgment or special
 provisions of a similar nature under the alteration.

As remarked by Mr. Justice Johnston who admitted this
 appeal the Court passing the decree was *functus officio* as an
 original Court and the general rule is that no executing Court
 can vary a decree except by consent of parties.

I concur in the decisions cited which conclude the question
 under consideration and dismiss the appeal with costs.

Appeal dismissed.

No. 100.

Before Hon. Mr. Justice Robertson.

NUR KHAN AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

SARFRAZ AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 131 of 1912.

Custom—alienation—Awans—Talagang tahsil—Riwaj-i-am—Jhelum District.

Held, that by custom among Awans of the Talagang tahsil a childless proprietor has the power to alienate ancestral property to a near collateral in the presence of his father, who had gifted the land to him in his life-time, and step brothers, even without necessity.

79 P. R. 1896 (*Bakhsha v. Mir Baz*) (1), 53 P. R. 1899 (*Deri Dass v. Bhakra*) (2), 46 P. R. 1900 (*Nura v. Tora*) (3), 8 P. R. 1906 (*Khudayar v. Fatteh*) (4), 15 P. R. 1907 (*Amir Ali v. Baggo*) (5) and 88 P. R. 1911 (*Khuda Bakhsh v. Waham Ali*) (6).

(1) 79 P. R. 1896.
 (2) 53 P. R. 1899.
 (3) 46 P. R. 1900.

(4) 8 P. R. 1906.
 (5) 15 P. R. 1907.
 (6) 88 P. R. 1911.

Further appeal from the decree of E. A. Estcourt, Esquire, Divisional Judge, Attock Division, dated 8th March 1911.

Nand Lal for appellants.

Respondents in person.

The judgment of the learned Judge was as follows :—

ROBERTSON, J.—On the 27th January 1909 one Shah Nawaz sold one-half of his one-third share of 901 *kanals*, 6 *marlas* to Ahmad and Nur Khan, his relatives, for Rs. 100. The vendees were the vendor's first cousins once removed. The father of Shah Nawaz, it is alleged, had separated Shah Nawaz on his second marriage and given him this land. Shah Nawaz, who was sonless, alienated it to Ahmad and Nur Khan shortly before his death. It is found, however, on the facts by the Lower Appellate Court that the sale itself was genuine and that Shah Nawaz, though ill at the time of mutation, was quite able to understand what he was doing. It is also found that there is no proof whatever of necessity. The plaintiffs are Shah Nawaz's own father and his step-brothers, sons of the same father. The sole question, therefore, is whether Shah Nawaz was competent to make this alienation in the presence of his father and step-brothers. 18th June 1912.

A number of judgments have been quoted to me. In 79 *P. R.* 1896 (*Bakhsha v. Mir Baz*) (1), it was decided that among Awans of Khushab *tahsil*, Shahpur District, a gift by a sonless proprietor to his wife's brother, who was also a distant collateral, in the presence of the plaintiff's step-brothers, was valid. That is a Shahpur case and there the powers of alienation among Awans are very large. In 53 *P. R.* 1899 (*Devi Dass v. Bhakra*) (2), however, it was found in regard to the Awans of the Mianwali *tahsil*, Mianwali District, that a childless proprietor has an unrestricted power of disposing of the ancestral land by sale. In 46 *P. R.* 1900 (*Nura v. Tora*) (3) it was found that among the Awans of the Talagang *tahsil*, in which the land in suit is situate, a gift by a childless male proprietor of ancestral land accompanied by possession in favour of his wife's sister's son is valid by custom in presence of his own brothers. In 8 *P. R.* 1906 (*Khudayar v. Fatteh*) (4), it was found that among the Awans of Talagang *tahsil* a male proprietor is competent in the presence of nephews to make a gift of his property in favour of a daughter's son who had rendered him service. In 15 *P. R.* 1907 (*Amir Ali v. Baggo*) (5),

(1) 79 *P. R.* 1896.

(2) 53 *P. R.* 1899

(3) 46 *P. R.* 1900.

(4) 8 *P. R.* 1906.

(5) 15 *P. R.* 1907.

it was found that by custom among the Awans of Rawalpindi District a bequest of ancestral property by a sonless proprietor in favour of his daughter is valid in presence of his brothers. Lastly in 88 P. R. 1911 (*Khuda Bakhsh v. Waham Ali*) (1), it was held that the plaintiff had failed to prove that by custom among the Awans of Talagang *tahsil*, Attock District, his father was not competent to make an alienation of his ancestral property in the presence of his sons.

In Talbot's Customary Law of Jhelum District, in which Talagang *tahsil* was then incorporated, in answer to question 105—what are the powers of a sonless proprietor as regards alienations other than gift—the Awans said “he has full power.” And Mr. Talbot adds a note: “There are a good many dissentients who say that it is not lawful for him to “alienate without necessity.”

In face of all these authorities, against which none have been quoted, I am constrained to find that the alienation in this case, which was to a near collateral, was valid in presence of the father and step-brothers of the alienor. I accordingly accept the appeal and dismiss the suit with costs throughout.

Appeal accepted.

No. 101.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

SHEIKH GHULAM ALI—(PLAINTIFF)—APPELLANT

Versus

DIWAN SHIV NATH AND TWO OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 12 of 1911.

Indian Trust Act, II of 1882, section 63—following trust property into hands of any one in whose hands it can be identified.

One L. D. made over his property to two trustees for liquidation of his debts. The trustees executed several promissory notes in favour of creditors. The original trustees were subsequently released by the Court and two new trustees appointed. L. D. having meanwhile died, his son S. N. sued the new trustees for possession of the trust property, and the suit was compromised on an understanding that the property had been restored to plaintiff. The restoration had, however, been incomplete. The holders of the promissory notes now sued S. N. and the new trustees for recovery of their money.

Held, that under section 63, Indian Trusts Act, the trust property could be followed into the hands of S. N. and he should accordingly be made liable for the decree jointly with the trustees to the extent of the trust property in his possession.

First appeal from the decree of Lala Mul Raj, M.A., District Judge, Lahore, dated the 31st October 1910.

Shadi Lal for appellant.

Nanak Chand for respondents.

The judgment of the Court was delivered by—

KENSINGTON, J.—The question involved in the seven appeals Nos. 12 to 18 of 1911 is precisely the same, and they will be disposed of by one judgment. 21st June 1912.

The appeal lay of right to this Court in cases Nos. 12 and 13, in each of which the amounts involved is over Rs. 500. In the remaining five cases the amounts were under Rs. 500 and the appeals would ordinarily have been to the Divisional Court, but as it was desirable that all should be dealt with together the Judge by whom these appeals were admitted, acting under section 151, Civil Procedure Code, directed that these five appeals also should be heard in the Chief Court without going through the formality of presentation to the Divisional Court in order that orders of transfer might be immediately passed.

A preliminary objection has been made by counsel for the respondent Diwan Shib Nath that this procedure is irregular. We have overruled this objection as we consider that it would be a manifest abuse of Court process to put the appellants to the unnecessary trouble of going first to the Divisional Court, where there is no intention of permitting that Court to take any action beyond registering the appeals as duly presented, section 151, Civil Procedure Code gives us ample powers to meet the technical difficulty set up. It could, if necessary, be disposed of by making over the appeals even now to the Divisional Court with instructions to transfer them at once to the Chief Court immediately after registration, and under section 5 and section 14, Limitation Act, no question of limitation would be listened to, but we decline to make any such ridiculous order and hold that the appeals are properly before us for decision.

The essential facts of these appeals are very simple. By two deeds dated 21st March and 20th April 1903, the latter attested by Diwan Shib Nath, his father the late Diwan Lachman Das made over his property in trust to Mr. Parker and Mr. Herbert in order that his debts might be liquidated. On the 25th May 1903 the trustees executed the promissory notes on which these suits are based, in favour of certain creditors for comparatively small sums making them payable on the 26th January 1904 (pages 30—32 of the paper-book).

On the 1st January 1904 Diwan Lachman Das died and his son three days later gave notice repudiating the Trust, to which he had previously consented (page 32). On the 21st April 1904 (pages 50—52) the District Judge released the original trustees and appointed in their place two other persons now represented by defendants Nos. 2 and 3.

On the 1st August 1907 Diwan Shib Nath instituted a suit against the second trustees for possession of the Trust property. This suit was dismissed on the 20th May 1909 on compromise (pages 53 and 54) on an understanding that all the property had been restored to the plaintiff, but it has transpired that the restoration has been in fact incomplete. This is the finding of the Lower Court, based on Diwan Shib Nath's pleas (pages 56, 59 and 61) and as there was no dispute on the point the issues of the present suits (page 64) do not go into the question how much of the property is still in the hands of the second trustees and how much in those of Diwan Shib Nath.

The present suits by the creditors, based on the promissory notes of 1903, were instituted in January 1910 as against (1) Diwan Shib Nath and (2) the second trustees. The Lower Court has given decrees against the latter only, and these appeals are by the plaintiffs to enforce the joint liability of Diwan Shib Nath. None of the facts as given above are disputed.

The Lower Court has dismissed the suits as against Diwan Shib Nath on the technical ground that he was no party to the promissory notes sued on. This is a singularly unconvincing ground as defendants Nos. 2 and 3 were also no parties to the promissory notes, and yet they have not contested liability. Where the Lower Court has gone wrong, however, is in overlooking the well known legal principle that trust property can be followed into the hands of any one in whose hands it can be identified. This is laid down in section 63, Indian Trust Act, II of 1882, read with the illustrations thereto, and in the body of English case law of the Court of Chancery in its equitable jurisdiction, upon which the Indian Act is framed. The question is discussed in Lecture X of Agnew's Law of Trusts in British India, 1882, being the Tagore Law Lectures of 1881. The principle may be summarised by saying that the only person who can escape liability for trust property in his possession is a *bonâ fide* transferee for value without notice of the trust or a transferee from him. There is no attempt to make an allegation that Diwan Shib Nath can be brought into this category. His counsel felt unable to argue either (1) that the trust was void, or (2) that Diwan Shib Nath had no notice, and

(3) that he had no trust property in his possession. Under these circumstances his joint liability is clear.

There is also no answer to a further plea of the plaintiff-appellants that the interest allowed by the District Judge at 6 per cent. should have been made payable to the date of realisation instead of the date of decree.

The appeals are accordingly accepted. The decrees of the Lower Court are varied by making Diwan Shib Nath, defendant No. 1, liable equally with defendants Nos. 2 and 3 for the amounts decreed, and further by making the interest allowed at 6 per cent. payable from the date of institution of the suits till realisation of the amounts by the plaintiffs. The amounts will be realisable from such property only as is found in execution proceedings to be in the possession of the various defendants as property included in the trust. The decrees will carry costs throughout against all the defendants.

Appeal accepted.

No. 102.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

KARIMULLA—(PLAINTIFF)—PETITIONER

Versus

MUSSAMMAT KIMON AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Revision No. 3588 of 1910.

Revision—Punjab Courts Act, XVIII of 1884, section 70 (1) (a)—wrong decision as to onus probandi, no ground for revision under clause (a)—the distinction between clause (a) and clause (b) of section 70 pointed out.

Plaintiff as collateral of one K. N. deceased, a Julaha of mauza Mararah, Gurdaspur tahsil and District, sued for cancellation of the sale of a house made by K. N.'s widow, as being without necessity. The Lower Appellate Court held that the burden of establishing a custom limiting the widow's power of alienating the property in suit was on the plaintiff, who had failed to discharge it, and dismissed the suit. Plaintiff applied to the Chief Court in revision under section 70 (1) (a) of the Punjab Courts Act on the ground *inter alia* that the *onus probandi* had been wrongly laid.

Held, that as the Lower Appellate Court had not ignored the point but dealt with it fully, the Chief Court was not competent in revision under section 70 (1) (a) of the Courts Act to consider the correctness of decision. The distinction between the provisions of clause (a) and clause (b) of section 70 (1) pointed out.

64 P. R. 1885 (*Rama v. Jowahir*) (1), 22 P. R. 1886 (*Hari Singh v. Dit Mal*) (2), *Sundar Singh v. Doru Shankar* (3), and *Amir Hassan Khan v. Sheo Bakhsh Singh* (4), referred to.

(1) 64 P. R. 1885.

(2) 22 P. R. 1886.

(3) (1897) I. L. R. 20 All. 78.

(4) (1884) I. L. R. 11 Cal. 6 (P. C.).

Petition under section 70 (1) (a) of Act XVIII of 1884 for revision of the decree of Lala Sansar Chand, District Judge, Gurdaspur, dated 31st May 1910.

Badar Din for petitioner.

Fazal Elahi for respondents.

The judgment of the learned Chief Judge was as follows :—

25th June 1912.

SIR ARTHUR REID, C. J.—This is an application for revision under section 70 (1) (a) of the Courts Act and notice has been issued on the ground that “ the *onus* has apparently been “ wrongly laid, in effect.”

The suit is “ unclassed ” of the value of Rs. 99 and is for cancellation of a sale by a widow and for possession of the property sold. The issues were whether the plaintiff was reversioner of Rahim Bakhsh, husband of the widow ; whether the parties were bound by Customary Law or Muhammadan Law ; whether the plaintiff was barred from suing ; whether the purchase-money was used by the widow for a purpose specified in her husband’s will and whether the alienation was for legal necessity and for consideration. The Lower Appellate Court dismissed the suit on the ground that the plaintiff had not proved that the widow could not, under the Customary Law governing the parties, alienate the house in suit and the alleged error in imposing the burden of proof is with reference to this point.

The Lower Appellate Court considered various rulings and arrived at the conclusion on those rulings that the burden of establishing a custom limiting the widow’s power of alienating the property in suit was on the plaintiff and had not been discharged. The Lower Appellate Court did not ignore the point and does not appear to have ignored any authority or instance cited.

In 64 P. R. 1885 (*Rama v. Jowahir*) (1), Barkley and Spitta, JJ., held that interference in revision was not justified by an erroneous decision whether the plaintiff had a cause of action for the relief prayed for, provided that the Court below had jurisdiction to decide, and did decide, whether a cause of action existed.

In 22 P. R. 1886 (*Hari Singh v. Dil Mal*) (2), Plowden, S. J. and Burney, J., held that interference in revision was not justified, where a Court having jurisdiction over a suit or other proceedings had to consider the plea of limitation and did consider it and decided it erroneously.

In *Sundar Singh v. Doru Shankar* (1), Edge, C. J., and Banerji, J., decided that the fact that a Court, having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it, afforded no ground for revision.

In each of the above cases the ruling of their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* (2) was cited.

There is a very wide distinction between the powers of this Court under section 70 (1) (a) and 70 (1) (b) of the Courts Act, prior to its amendment by Punjab Act I of 1912, and this distinction is apparently frequently lost sight of.

The counsel of perfection doubtless would be for every question of law to go to the highest Court in the province, but considerations of the expense of the maintenance of a Court of sufficient strength to deal with every case, and of avoiding waste of time over petty cases by giving finality on questions of law to subordinate Courts in such cases, have resulted in the exclusion of certain cases from the provisions of section 70 (1) (b) and it is, in my opinion, absolutely illegal to apply section 70 (1) (b) to such cases in the guise of 70 (1) (a). The question of *onus* consequently cannot, in my opinion, be touched in this case, and the other points taken have no force.

The application is dismissed with costs.

Application dismissed.

No. 103.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

DHANA SINGH AND ANOTHER—(PLAINTIFFS)—
APPELLANTS

Versus

MUSSAMMAT BUDHI—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 379 of 1912.

Res judicata—issue decided in a previous suit in which the parties were co-defendants.

A widow sold her occupancy rights to the present plaintiffs. The reversioners sued to contest the alienation, impleading both the widow and the present plaintiffs. The widow denied sale and receipt of consideration. Among the issues framed was one whether consideration passed. This was decided against the present plaintiffs, who then sued the widow for possession of the land sold to them.

Held, that the question of payment of consideration for the alleged sale was *res judicata* between the parties.

Balambhot v. Narayanbhat (1), *Ramachandra Narayan v. Narayan Mahader* (2), 140 P. R. 1890 (*Nehal Singh v. Chanda Singh*) (3), *Magni Ram v. Mehdi Hossein Khan* (4), and *Venkayya v. Narasamma* (5), followed.

Further appeal from the decree of Khan Bahadur Maulvi Inam Ali, Divisional Judge, Jhelum Division, dated 16th May 1911.

Kishori Lal for appellants.

Dhanpat Rai for respondent.

The judgment of the learned Chief Judge was as follows :—

27th June 1912.

SIR ARTHUR REID, C. J.—This is an appeal under section 70 (1) (b) of the Courts Act and was admitted on the question whether the Lower Appellate Court was right in holding that the question of payment of consideration for an alleged sale was *res judicata* by reason of a decision in a previous suit.

The present suit is against a widow for possession of certain occupancy rights alleged to have been sold by her to the plaintiffs. She denied receipt of consideration.

The previous suit was by the reversioners of the widow's husband against the present plaintiffs and the widow, and among the issues framed was one whether consideration passed. This issue was decided against the present appellant. The widow did not plead, but was examined as a party and denied sale and receipt of consideration, but stated that she had mortgaged for Rs. 40. She remained in possession of the property on the ground that consideration had not passed; her interests and those of the present appellants were obviously conflicting.

Balambhat v. Narayanbhat (1), cited for the appellants consequently does not help them, but on the contrary helps the respondents. In *Ramachandra Narayan v. Narayan Mahadev* (2), followed in 140 P. R. 1890 (*Nehal Singh v. Chanda Singh*) (3), West, J., said :—

“Where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff, there must be such an adjudication, and in such a case the adjudication will be *res judicata* between the defendants, as well as between plaintiffs and defendants. But for this effect to arise there must be a conflict of interests among the defendants and a judgment defining the real rights and obligations of the defendants *inter se*.”

(1) (1900) 1. L. R. 25 Bom. 74.

(2) (1886) 1. L. R. 11 Bom. 216.

(3) 140 P. R. 1890.

(4) (1903) 1. L. R. 31 Cal. 95

(5) (1887) 1. L. R. 11 Mad. 201.

To the same effect are *Magni Ram v. Medhi Hossein Khan* (1) and *Venkayya v. Narasamma* (2).

The pleader for the appellants contended that the respondent did not take an active part in the previous suit, in making good her allegation that consideration had not passed, and that the rulings cited were consequently inapplicable, having regard to some remarks at page 206 of the report in XI Madras.

In my opinion her action was adverse to the appellants and this contention has no force.

For these reasons I hold that the Lower Appellate Court correctly decided that the question of consideration having passed was *res judicata*. The other grounds taken have no force, the third being distinctly opposed to 55 P. R. 1911 (*Mussammat Bhagan v. Alla Ditta*) (3).

The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 104.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

LAKHMI DAS—(PLAINTIFF)—APPELLANT

Versus

BALAK RAM—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 355 of 1912.

Civil Procedure Code, 1908, order 2, rule 2—no bar to separate suits for possession of land and recovery of purchase-money under same contract—different causes of action.

On 29th July 1907 one B. R. sold 6 *bighas*, 3 *kanals* of land to D. On 12th November 1907 B. R. sued to have the sale cancelled on the ground that the sale was made when he was a minor.

On 13th January 1908 the Court of first instance decreed B. R.'s claim. On 28th January 1908 B. R. sold the 6 *bighas*, 3 *kanals* to L. D. and his brother, together with 2 *bighas*, 1 *kanal* for Rs. 590, and in the sale deed it was stipulated that if there was any legal defect in the title to the property sold the vendees could recover the purchase-money together with interest. Subsequently D. who had appealed against the judgment of the 13th January 1908 was successful and the sale to him of the 6 *bighas*, 3 *kanals* was upheld and B. R.'s suit dismissed.

B. R. then refused to give up to L. D. and his brother the remaining 2 *bighas*, 1 *kanal* sold to them. Thereon L. D. filed the two present suits, *viz.*, one for recovery of his share in the sale price of the 6 *bighas*, 3 *kanals* taken

(1) (1903) I. L. R. 31 Cal. 95.

(2) (1887) I. L. R. 11 Mad. 201.

(3) 55 P. R. 1911.

by D. and the other for possession of his one-half share of the remaining 2 *bighas*, 1 *kanal* sold to him and his brother by the deed of 28th January 1908.

Held, that the causes of action in the two suits were different and that consequently neither was barred by order 2, rule 2, Civil Procedure Code.

Hanuman Kamut v. Hanuman Mandur (1), referred to.

Miscellaneous further appeal from the decree of Rai Sahib Bhagat Narayan Das, Ahluwalia, Divisional Judge, Shahpur Division, dated 20th June 1911.

Kishori Lal for appellant.

Nemo for respondent.

The judgment of the learned Chief Judge was as follows:—

29th June 1912.

SIR ARTHUR REID, C. J.—The facts are stated in the judgments of the Courts below.

The question for consideration is whether this suit for possession of land alleged to have been sold by the defendant-respondent to the plaintiff-appellant is barred by order 2, rule 2 of the Code of Civil Procedure, because the plaintiff filed separate suits against the defendant for possession of this land and for recovery of purchase-money of part of the land sold on the ground that the defendant had no title to convey. The two plots of land sold were included in one sale deed, but the causes of action for the suits were, in my opinion, not the same.

In the language used by Wilson, J., in *Hanuman Kamut v. Hanuman Mandur* (1), the present claim is in respect of a totally different cause of action from that raised in the former suit. This suit is based upon an alleged title to the land in suit and the relief sought is recovery of the land on the strength of that title.

The other suit was based upon the fact that there was no title and upon the fact that the plaintiff got nothing in return for the consideration-money paid by him for that part of the land sold. Order II, rule 2, is therefore no bar to the suit.

I decree the appeal, set aside the decree of the Lower Appellate Court and under order XLII, rule 23 of the Code, I remand the appeal to the Lower Appellate Court for decision.

Costs of this Court will be costs in the cause.

Case remanded.

No. 105.*Before Hon. Sir Arthur Reid, Kt., Chief Judge.***BHAGWAN SINGH—(PLAINTIFF)—APPELLANT***Versus***HARDIT SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 378 of 1912.

Indian Registration Act, III of 1877, section 47—day from which registered deed of sale “ operates ” where consideration has not been paid.

Held that, in the absence of a specific contract to the contrary, the failure to pay consideration on a sale of immoveable property does not prevent the registration antedating to the date of the execution of the deed under section 47 of Registration Act.

132 P. R. 1879 (Abbas Ali Shah v. Pir Buksh) (1), 91 P. R. 1902 (Gharib Khan v. Sikandar) (2), and Motichand Jirraj v. Sagun Jethiram (3), referred to and followed.

Lakshman Das Sarup Chand v. Basrat (4), 93 P. R. 1883 (Bhagat Singh v. Ram Narain) (5), and 55 P. R. 1911 (Mussammatt Bhagan v. Allah Ditta) (6), distinguished.

Further appeal from the decree of Major B. O. Roe, Divisional Judge, Amritsar, dated 17th April 1911.

Santanam and Badr-ud-din for appellant.

Rambhaj Datta for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—This appeal was admitted on the 29th June 1912, “ question of date from which plaintiff-appellant’s deed “ takes effect.” The deed was a sale deed.

The Lower Appellate Court has held that registration within four months of execution had not the effect, under section 47 of the Registration Act, of giving the deed priority over a subsequent deed registered before the deed in suit was registered. This decision is based on the words in section 47 “ the time from which it would have commenced to operate if “ no registration had been required or made,” coupled with the proposition that if there “ is no payment of any consideration “ there is no sale.”

This proposition is opposed to the dictum of Plowden, J., in 132 P. R. 1879 (*Abbas Ali Shah v. Pir Buksh*) (1), followed

(1) 132 P. R. 1879.

(2) 91 P. R. 1902.

(3) (1904) I. L. R. 29 Bom. 46.

(4) (1881) I. L. R. 6 Bom. 168.

(5) 93 P. R. 1883.

(6) 55 P. R. 1911.

in 91 P. R. 1902 (*Gharib Khan v. Sikandar*) (1), that there is certainly no rule of law that a sale of immovable property is not complete and the ownership does not pass until the purchase-money is paid.

These rulings and *Moti Chand Jivraj v. Sagun Jethiram* (2), are authority for holding that, in the absence of specific contract to the contrary, the failure to pay consideration did not prevent the registration antedating to the date of the execution of the deed.

The pleader for the respondents cited *Lakshman Das Sarup Chand v. Basrat* (3), 93 P. R. 1883 (*Bhagat Singh v. Ram Narain*) (4), and 55 P. R. 1911 (*Mussammat Bhagan v. Allah Ditta*) (5). Of these the first is not in point, as it deals with notice. It would be idle in the present case to contend that Gulab Singh was not aware of the execution by his grandson of a sale deed and refusal of registration on the ground that the executant was an infant. Gulab Singh's action, in procuring a medical certificate of the executant's age so soon after registration was refused, would be ample reply to that contention. The second authority dealt with a case in which the period for registration had elapsed and consequently does not help the respondents, the deed now in suit having been registered within the prescribed period.

The third authority dealt with a case in which both parties intended that "ownership" should not pass until payment of consideration.

On the authorities cited, I hold that section 47 of the Registration Act has the effect of antedating the registration of the sale deed in suit to the date of execution.

I decree the appeal, set aside the decree of the Lower Appellate Court and, under order XLI, rule 23 of the Code of Civil Procedure, remand the appeal for decision.

The Lower Appellate Court is at liberty to deal with the questions of making the decree for possession, should one be passed, subject to payment of sale consideration and of mortgage consideration in respect of the mortgage for Rs. 800 to Kirpa Singh.

Costs of this Court will be costs in the cause.

Case remanded.

(1) 91 P. R. 1902.

(2) (1904) I. L. R. 29 Bom. 46.

(3) (1881) I. L. R. 6 Bom. 168.

(4) 93 P. R. 1883.

(5) 55 P. R. 1911.

No. 106.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Robertson.*

NUR MUHAMMAD AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

BHAGWAN DAS—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 563 of 1911.

Indian Trusts Act, II of 1882, sections 1 and 5—creation of wakf without written instrument—Muhammadan Law—gift of undivided shares in immoveable property—Mushaa—declaration by donor that possession has been given to donees.

Held, that the provisions of section 5 of the Indian Trusts Act do not apply to *wakf* (*vide* section 1) and that a written instrument is, therefore, not obligatory for the creation of a *wakf*.

Held also, that a gift is not invalid under Muhammadan Law merely because there was no formal acceptance of it by the donee at the time of the execution or registration of the deed.

Held also, that whether a gift of undivided property is valid or not under Muhammadan Law, possession given and taken under such a gift effectually transfers the property.

Held further, that a declaration by the donor in the deed of gift that possession has been given to the donee is binding on the donor's heir and all persons claiming through him.

Held, consequently, that a gift by a father by registered deed in favour of his sons, grandson and wives of certain land, houses and shops, of which the father was in joint possession with the donees, and of which he subsequently gave entire possession to the donees was valid and in accordance with Muhammadan Law.

Humera Bibi v. Najm-un-Nissa Bibi (1) and 57 P. R. 1882 (*Tara v. Jodha*) (2).

Muhammad Muntaz Ahmad v. Zubaida Jan (3) and 91 P. R. 1894 (*Mussammatt Murad Khatun v. Ahmad Ali*) (4), referred to.

Further appeal from the order of M. L. Waring, Esquire, Divisional Judge, Multan Division, dated 1st April 1911.

Kamal-ud-Din, for appellants.

Gokal Chand and Vaughan, for respondent.

The judgment of the Court was delivered by—

ROBERTSON, J.—The property in suit was attached in execution of a decree in favour of one Bhagwan Das, defendant No. 1 in 22nd July 1912.

(1) (1905) I. L. R. 28 All. 117.
(2) 57 P. R. 1882.

(3) (1889) I. L. R. 11 All. 460 and
L. R. 16 I. A. 205 (P. C.).

(4) 91 P. R. 1894.

this suit, against Walidad, defendant No. 2. Objections were taken to the attachment and were rejected, and the plaintiffs have now brought this suit for a declaration that certain houses and shops are not the property of the judgment-debtor. The plaintiffs are the sons, grandson and wives of the defendant Walidad, and they base their claim to ownership of part of the property upon a deed of transfer (*tamlignama*) executed by Walidad and registered on September 16th, 1909, on the occasion of his departure for Mecca. This suit covers certain houses and shops and a wrestling ground. The rest of the property in suit consists of a *sarai*, a mosque and a well said to have been made *wakf* property by him.

With regard to the *wakf* property the case can be disposed of in a few words. The learned Divisional Judge has held that the *sarai* and well have not been proved to be *wakf* property and gives his reasons in the following words :—

“ The first ground, urged by defendant in appeal, is that a “ *wakf* is a trust, and that no trust in relation to immoveable “ property is valid unless declared by a non-testamentary “ instrument in writing, signed by the author of the trust or the “ trustee and registered or by the will of the author of the trust “ or of the trustee (section 5, Trust Act).

“ In this case there is no registered and signed document, “ the only writing being on a tablet let into the wall of the “ *sarai*. This tablet recites that the *sarai*, well and mosque were “ built by Walidad for the glory of God, and as an alms house “ for every religion.

“ This argument as to the invalidity of the alleged *wakf* “ appears to me unanswerable.

“ I find accordingly that the *sarai* and well have not been “ proved to be *wakf*. ”

The Divisional Judge has thus dismissed the suit on the ground that the case is governed by section 5 of the Trusts Act. He has omitted, however, to notice that the third paragraph of section 1 of the Trusts Act itself says, “ But nothing herein “ contained affects the rules of Muhammadan Law as to “ *wakf*.” It is therefore clear that the Trusts Act does not govern this case in any way, and the reasons given by the learned Divisional Judge for his decision cannot be supported. Counsel for the respondent admitted that he was unable to support the judgment of the Lower Appellate Court on the grounds stated.

As regards the other point both Courts have found that the alienation by the deed of the 16th September 1909 was not

valid. On this point the learned Divisional Judge says, "I will take plaintiffs' appeal first. The Lower Court found that the registered deed of gift was invalid, because there was no proof of acceptance by the donees, and because the shares mentioned in the deed had not been partitioned. There was no acceptance in the presence of the writer, Fattah Muhammad, or of the attesting witness Allah Bakhsh Khan, nor before the registering officer. On this evidence the Lower Court's finding that there was no acceptance can hardly be challenged.

"As to partition it is admitted that separate possession of the shares has not been given. Under these circumstances the gift is invalid (Wilson's Muhammadan Law, section 312).

"I dismiss plaintiffs' appeal with costs."

First as regards the facts, there appears to be no doubt that the donor and donees are members of one Muhammadan family living together and occupying jointly the property in question. There can be no doubt that just before his departure for Mecca the donor executed a deed and took all the necessary measures under the ordinary law of the land for transferring his property to the donees. It is not contended that the deed was not duly executed and registered, and it is found as a fact that the donees were in possession of the property after the gift. We are not at present concerned in any way as to whether the gift was in itself intended for the purpose of the fraudulent deprivation of creditors. *Inter partes* there can be no doubt that the gift was, unless incomplete under the provisions of the Muhammadan Law, a good and a valid one. It has been found, however, by both Courts that it was invalid according to Muhammadan Law. We have quoted the opinion of the learned Divisional Judge on this point. The first Court gives its decision in the following words:—

"Issue No. 3.—Was the rest of the property in suit alienated by valid gift to the plaintiffs by defendant No. 2 in good faith?"

Onus on plaintiffs.

"This issue is not proved. The *tamliqnama* was witnessed by Allah Bakhsh Khan, 2 P. W., and written by Fattah Muhammad, deed-writer, 3 P. W., and these witnesses shew that there was no acceptance of the transfer at the time of the execution of the deed, and the Registrar's note shews that none of the plaintiffs were present at registration. Acceptance is obligatory (pages 79-80 of Mulla's Muhammadan Law, article 114.)

“ Certain shares are also named in the deed, but these were never partitioned off and partition is obligatory (*vide* Wilson’s Muhammadan Law, page 353, article 312).”

It will be seen that the Lower Courts have based their decision on the ground that there was no specific and formal acceptance of the gift at the time of the execution or registration of the deed. It is also stated that there were certain shares which were not partitioned off, and that their partition was obligatory under the Muhammadan Law. It appears to us that the views taken of Muhammadan Law in these decisions cannot be supported. Here again counsel for the respondent had to admit that he could not support the decision of the Lower Courts on the ground given.

It must be remembered that among the donees are two *pardah nashin* women and two infants. No doubt it is a general principle of Muhammadan Law as regards gifts, that a gift is not valid unless it is both made and accepted. It is not, however, anywhere laid down, as far as we are aware, that the signification of the acceptance must be at any particular moment of the transaction. For instance we find that in section 303 of Wilson’s Muhammadan Law it is laid down that “ no transfer is necessary in the case of a gift by a father to his infant son, the declaration of gift being considered to change the possession by the father of his own account into possession as guardian on his son’s account. And the Law is the same in every other case where the donee is a minor in lawful custody of the donor.”

In *Humera Bibi v. Najm-un-nissa Bibi* (1), it is laid down that “ it is not necessary according to Muhammadan Law that in all cases where a gift of immoveable property is made the donor should actually physically vacate the property which is the subject of the gift. Where the gift was of a house and other immoveable property, and was made by registered instrument and attended by circumstances of great publicity, the fact that the donor, who was the aunt of the donee, never quitted the house, but continued to reside in it with her nephew, was held to be of no effect in the face of the clearly manifested intention of the donor to transfer possession of the house to the donee.”

In 57 P. R. 1882 (*Tara v. Jodha*) (2), it was held that “ according to Muhammadan Law, though there is a difference of opinion between the Doctors as to the validity of a gift to

“two persons or more of property that admits of partition, such a gift is not void, and possession—cures the defect arising from the shares of the donees not being defined.” This is a Division Bench ruling of this Court, and, so far as we are aware, has never been traversed since, from which it appears that it expresses the view which we should follow unless very strong reason is shewn to the contrary. Baillie’s Digest of Muhammadan Law, pp. 515–516 was quoted in support of the view taken in that judgment.

At page 48 of Ameer Ali’s book on Muhammadan Law it is noted that “a gift of specific shares is not open to objection under Muhammadan Law.” And further at page 49 it is stated that a gift of part of a divisible thing is valid. It is also laid down that “a formal and solemn declaration by the donor that he had complied with all the requirements of the law in perfecting the gift would be binding evidence of delivery of possession.” See *Muhammad Mumtaz Ahmad v. Zubaida Jan* (1). In that judgment of the Privy Council it was laid down that “whether a gift of undivided property is valid or not under Muhammadan Law, possession given and taken under such gift effectually transfers the property.”

“A declaration by the donor in the deed of gift that possession has been given binds the heirs of the donor, and possession once taken cannot be invalidated by any subsequent change of possession.” The deed of gift in this case contains an unequivocal statement that possession and proprietary rights have been made over to the donees.

In section 115 of Mulla’s book of Muhammadan Law, paragraph (3), it is laid down that “a gift of immoveable property in which the donor and the donee are both residing at the time of the gift may be completed by declaration and acceptance without formal delivery and possession such as are required in sub-section (1) when the donor alone is residing in the premises.” In this case before the gift donor and donees appear to have been in joint occupation of the property.

In *Muhammad Mumtaz Ahmad v. Zubaida Jan* (1) their Lordships of the Privy Council held that the law relating to the invalidity of gifts of *Mushaa*, i.e., the prohibition of the gift of an undivided part in property capable of partition, ought to be confined within the strictest rules, and the

authorities on the Muhammadan Law shew that possession taken under a gift even although that gift might with reference to *Mushaa* be invalid without it, transfers effectively the property given according to the doctrines of both the Shia and the Sunni schools. Possession once taken under a gift is not invalidated, as regards the effect in supporting the gift, by any subsequent change of possession.

The subject of the gift was shares in revenue-paying villages, with land, houses and moveables. Of the greater portion of this property, the donor, a mother giving them to her daughters, had only so far possession that she was in receipt of the rents and profits. In the deed of gift she declared (thereby making an admission whereby her heir and all claiming through him were bound) that she had made the donee, her daughter, possessor of all the properties, and she directed that the gift should be carried into effect by the daughter's husband, who was manager of estates on behalf of both mother and daughter before then. It was held in a suit for the possession of the property in a sale by the heir of the donor, brought by the vendees against him and joining as defendants the heirs of the daughter, then deceased, that sufficient possession had been taken on behalf of the daughter to render the gift effectual, and to defeat the claim as against her heirs. In Wilson's Muhammadan Law, section 309, it is laid down that the gift of an undivided share in anything which does not admit of a partition, or is of such a nature that it can be used to better advantage in an undivided condition, is valid. This ruling was followed in 91 P. R. 1894 (*Mussammat Murad Khatun v. Ahmad Ali*) (1).

It will be seen, therefore, that in view of the authorities quoted above, the gift in this instance, which was made by the father, who was in joint possession with his sons, wives and grandson, and who made over entire possession to the donees, was valid and in accordance with the Muhammadan Law. As we have noted counsel for the respondent admitted his inability to support the view that it was invalid under the Muhammadan Law, though he contended that it was invalid on other grounds. These of course can be gone into by the Lower Court on remand. As the supposed invalidity of the gift according to Muhammadan Law and the applicability of the Trusts Act are the sole reasons given in both the Lower Courts for dismissing the suit, we accept the appeal and remand the suit under order XLI, rule 23, Civil Procedure

Code, to the Court of First Instance, for decision on the merits, Court-fee on the memorandum of appeal will be refunded and other costs will be costs in the cause.

This judgment also disposes of the connected Civil Appeal No. 589 of 1911.

Appeal accepted.

No. 107.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Robertson.*

FAIZ MUHAMMAD—(OBJECTOR)—APPELLANT

Versus

THE SECRETARY OF STATE—RESPONDENT.

Civil Appeal No. 722 of 1911.

Pleader's fee—in appeals in land acquisition cases—where claim in appeal is exorbitant.

Held, that where the claim made in a land acquisition appeal is exorbitant and speculative, there is no reason for not allowing as counsel's fee the usual *ad valorem* fee on the amount in appeal.

First appeal from the decree of S. Wilberforce, Esquire, Additional Divisional Judge, Lahore, dated 31st March 1911.

Muhammad Shafi, for appellant.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—This is an appeal from an award 20th July 1912. by the Divisional Judge, Lahore, in a land acquisition case. The land acquired measured 36 *kanals*, 19 *marlas*, situate between the Railway line and land belonging to the Canal Department, a portion being accessible at one end from other land.

The Land Acquisition Officer assessed the value at Rs. 15 *per kanal* for part of the land and Rs. 10 a *kanal* for the rest. This with 15 per cent. for compulsory acquisition, and interest, and *jagir* compensation amounted to Rs. 640-13-3. The Divisional Judge has recorded cogent reasons for holding that this amount is adequate.

* * * * *

The appeal fails and is dismissed with costs.

Although the amount to be allowed as counsel's fee is discretionary we see no reason for not allowing the usual *ad valorem* fee on the amount in appeal, *viz.*, Rs. 6,466-4-0.

The learned Divisional Judge has remarked that the appellant's claim is the most absurdly extravagant claim that he ever had before him.

It is not denied that the appellant was awarded for a plot of land between the two plots now in suit, compensation at the rate now awarded, and his claim was *exorbitant* and *speculative*.

Under such circumstances owners have only themselves to thank if they are heavily mulcted in costs, and counsel's fees paid by the Secretary of State are usually assessed on the value of the appeal.

Counsel's fee is decreed at 5 per cent. on Rs. 5,000 and 2 per cent. on the balance.

Appeal dismissed.

No. 108.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Beadon.

MUSSAMMAT RALLI—(PLAINTIFF)—APPELLANT

Versus

SUNDAR SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 346 of 1910.

Indian Limitation Act, IX of 1908, articles 120, 125—sale of equity of redemption by a mortgagee, who has sub-mortgaged his rights, whether an alienation of "land" within meaning of article 125.

Held, that the sale by a mortgagee of his equity of redemption, after having sub-mortgaged his rights, is not an alienation of "land" within the meaning of article 125, Limitation Act, and a declaratory suit by the heir of the mortgagee in respect of such sale is consequently not governed by that article but by article 120.

117 P. R. 1885 (*Ranjit v. Tirkha*) (1), referred to and distinguished.

Further appeal from the decree of W. Chevis, Esquire, Divisional Judge, Gujranwala Division, dated the 18th January 1910.

Gobind Das, for appellant.

Sukh Dial, for respondent.

The judgment of the Court was delivered by—

13th July 1912.

SHAH DIN, J.—The facts of this case are clearly and accurately stated by the learned Divisional Judge. By a registered mortgage-deed, dated the 7th February 1874, the property to which the suit relates, *i.e.*, a house together with a courtyard, etc., was mortgaged with possession by one Bala Mal

to Amar Singh for Rs. 495. On the 14th April 1880 Amar Singh sub-mortgaged his rights as mortgagee to one Sardul Singh for Rs. 300. On the 15th of June 1896 Amar Singh's widow, Mussammat Malan, sold to Sundar Singh her right, title and interest in the mortgaged property, *i.e.*, the equity of redemption in respect of her mortgage rights, which were under mortgage with Sardul Singh, for Rs. 1,000, which sum included Rs. 600 due to Sardul Singh on the mortgage of 1880.

In May 1908, the plaintiff, who is a married daughter of Amar Singh, sued her mother and Sundar Singh for a declaration that the sale of the equity of redemption made by the former in favour of the latter in 1896 shall not affect her reversionary rights. The defendant Sundar Singh pleaded *inter alia*, that the suit was barred by limitation. The Sub-Judge overlooked this plea, but dismissed the plaintiff's suit on other grounds. On appeal the learned Divisional Judge held that the suit was governed by article 120 and not article 125 of the second schedule to the Limitation Act, and that since the right to sue had accrued to the plaintiff on the 15th June 1896 and the suit had not been brought within 6 years from that date, it was barred by time.

The plaintiff has preferred a further appeal to this Court and the sole question for decision is whether article 125 of schedule II to the Limitation Act governs the case; for if that article does not govern it, then the only other article applicable is admittedly article 120 and the suit has been rightly dismissed.

Article 125 runs as follows :—

“ Suit during the life of a Hindu or Muhammadan female
“ by a Hindu or Muhammadan who, if the female died at the
“ date of instituting the suit, would be entitled to the possession
“ of land, to have an alienation of such land made by the female
“ declared to be void except for her life or until her remarriage.”

By the sale-deed of the 15th June 1896 Mussammat Malan sold to Sundar Singh all her right, title and interest as mortgagee of the mortgaged property (the house together with the courtyard) subject to the rights of the sub-mortgagee Sardul Singh; and the question for decision is whether the aforesaid right, title and interest of Mussammat Malan is “land” within the meaning of article 125. Admittedly, Mussammat Malan was not the owner of the house; she only possessed mortgage-rights therein, which had been sub-mortgaged to Sardul Singh, the equity of redemption in respect of the mortgaged premises still vesting in the original owner Bala

Mal. Can it be said under these circumstances that what Mussammat Malan sold to Sundar Singh in 1896 was "land"? The learned Divisional Judge has answered this question in the negative, and we agree in his view.

The word "land" is defined neither in the General Clauses Act of 1897 nor in the Limitation Act of 1877, which is applicable to the present case, and it must therefore be taken in its dictionary sense; and taken in that sense, it is obvious that it does not cover the incorporeal rights which were sold by Mussammat Malan to Sundar Singh. In the unpublished decision of this Court in Civil Appeal No. 2878 of 1886, on which reliance is placed by the appellant's pleader, all that was held was that article 125 of the Limitation Act, 1877, applied to a case in which the property sold was a house *and its site*, and the question whether this article would govern a case in which the alienation related only to a house pure and simple *apart from the site* was left undecided. In the present case the property sold is neither a house and its site, nor a house apart from the site but only certain incorporeal rights, which by no stretch of language can be called "land."

The pleader for the appellant has contended that the word "land" in article 125 aforesaid must be taken to include "interest in land" that reading article 125 with article 141 of the Limitation Act, the only reasonable conclusion that can be drawn is that the legislature intended to use the word "land" in the earlier article as an equivalent of the expression "immoveable property" which is used in the later article; and that since the mortgaged rights sold by Mussammat Malan to Sundar Singh were rights arising out of a mortgage with possession, they were immoveable property within the meaning of section 3 (25) of the General Clauses Act. We are unable to accept this argument as sound. In three successive Limitation Acts, *i.e.*, Act IX of 1871, Act XV of 1877 and Act IX of 1908, the Legislature has thought fit to use the word "land" in the article which applies to a case of this kind; and it is difficult to believe that if it had been intended to use this word as meaning "immoveable property" in the sense in which that expression is used in the General Clauses Act, the Legislature would not have substituted that expression for the word "land" in the last amended Act. A similar change of phraseology has been effected in article 138 of the Limitation Act; for whereas in Act XV of 1877 the word "land" was used in article 138, in the present Act, IX of 1908, the language of article 138 has been so modified as to apply to "immoveable property" and not

merely to "land." We, therefore, think that the word "land" has been advisedly used by the Legislature in article 125 of the Limitation Act, and that the Courts are not justified in assigning to it the same meaning as to the expression "immoveable property."

The appellant's pleader has also argued that since the word "land" as used in Regulation I of 1798 and Regulation XVII of 1806 has been held to include "house property" the word "land" in article 125 of the Limitation Act must also have an extended meaning. In our opinion this argument has no force. As pointed out in No. 117 *P. R.* 1885 (*Ranjit v. Tirkha*) (1), the language of the Regulations in question is wanting in precision, and the Regulations were obviously intended to apply to mortgages by way of conditional sale of houses as well as of lands properly so called. In any case if the word "land" in these Regulations includes house property, it by no means follows that it has the same meaning as immoveable property, using this expression in the larger sense in which it is used in the General Clauses Act.

For the above reasons, we agree with the learned Divisional Judge in holding that article 125 of the Second Schedule to the Limitation Act does not apply to the present case; and we accordingly maintain the decree of the Lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

Full Bench.

No. 109.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Robertson and Hon. Mr. Justice Shah Din.

DYAL SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

RAM RAKHA AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 668 of 1909.

Court-fees Act, VII of 1870, sections 10 (ii) and 12 (ii)—procedure of Appellate Court when plaint or memo. of appeal is found to have been insufficiently stamped in lower Court and there was no special order on the point.

Held, that where it is found in an Appellate Court that the Court-fee on a plaint or memorandum of appeal, as the case may be, in the Court below

was insufficient, it is the duty of the Appellate Court to call upon the party whose fee was in defect, to make good the deficiency under section 12 (ii) of the Court-fees Act although no dispute as to the amount had arisen or been specially decided in the Lower Court.

115 P. R. 1884 (*Mela Mal v. Harbhaj*) (1) and 13 P. R. 1901 (*Kaka Ram v. Ram Sarn*) (2) overruled—*Narain Singh v. Chaturbhuj Singh* (3), *Madan Lal v. Jai Kishan Das* (4) and *Mohan Lal v. Nand Kishore* (5) followed on this point.

Held also, that if the deficiency is not paid within such time as the Appellate Court shall fix, the suit or appeal of the defaulting plaintiff or appellant, as the case may be, should be dismissed under the provisions of section 10 (ii) of the Act.

Madan Lal v. Jai Kishan Das (4) followed—*Narain Singh v. Chaturbhuj Singh* (3) and *Mohan Lal v. Nand Kishore* (5) dissented from, on this point.

Further appeal from the order of Major A. A. Irvine, Additional Divisional Judge, Lahore, dated 12th March 1909.

Nemo, for appellants.

Respondents, in person.

The following judgments were delivered—

21st June 1912.

ROBERTSON, J.—The point referred to the Full Bench in this case is as follows :—

“ When it is found in an Appellate Court that the Court-fee paid on a plaint or a memorandum of appeal, as the case may be, in the Court below is insufficient and no dispute as to the amount has arisen and been specifically decided in such Lower Court, with reference to section 12 of the Court-fees Act, what course ought the Court of Appeal to adopt ?

“ Should it accept the action of the lower Courts in proceeding to try a case as involving a decision of the correctness of the Court-fee under the first part of section 12 and so take action under the second part ; or should it hold that it is its duty to refer the matter back for decision of the Court which has allowed the case to proceed on insufficient fee ; or is any other course the correct one to adopt ? ”

The judgments of this Court which deal with the subject appear to be only two in number. In 115 P. R. 1884 (*Mela Mal v. Harbhaj*) (1), as far as we understand it, the view taken was that, if no question had arisen in the first Court, which was specifically decided by the presiding officer, as to the proper amount of Court-fee payable, no action could be taken by an Appellate Court under the second paragraph of section 12 of the

(1) 115 P. R. 1884.

(2) 13 P. R. 1901.

(3) (1898) I. L. R. 20 All. 362.

(4) All. W. N. (1905) 277.

(5) (1905) I. L. R. 28 All. 270 (F. B.).

Court-fees Act. The words used by the learned Judges of the Bench which decided that case are as follows :—

“ Upon examining the record of the first Court, it appears that no question arose in that Court upon the valuation of the suit for the purpose of determining the amount of fee chargeable. The plaintiffs ought, under the express terms of section 50 of the Civil Procedure Code, to have stated in their plaint approximately the amount sued for, and under paragraph (f), sub-section (11) of section 7 of the Court-fees Act, they ought to have stated the amount at which they valued the relief sought. They did not do so, but no question arose in consequence. Under these circumstances, no question having been decided by the first Court, it appears that the second paragraph of section 12 was not applicable when the plaintiffs appealed to the Additional Commissioner ; and that the Additional Commissioner was not competent to require from the plaintiffs an additional fee in respect of the first Court. It is only upon the ground of non-payment of the fee required for the first Court that the appeal to the Additional Commissioner has been dismissed, and on that ground his order cannot be sustained.”

It will be seen that the point was not fully discussed, and we think that there is considerable doubt as to the correctness of the view therein expressed.

The only other judgment of this Court, in which the point is noticed at all, is 13 P. R. 1901 (*Kaka Ram v. Ram Sarn*) (1) where the matter is merely noticed incidentally at page 48, the previous ruling of 1884 being followed.

The question, however, has been more fully dealt with in various judgments of the Allahabad High Courts. The first case is that of *Narain Singh v. Chaturbhuj Singh* (2). In that case it was discovered on second appeal to the High Court that the respondent, when appellant in the Lower Appellate Court, had not paid a sufficient Court-fee on his memorandum of appeal in that Court and, though he had been called upon to do so by the High Court, he had, up to the date of hearing of the appeal, not made good the proper Court-fee upon the memorandum of appeal in the Lower Appellate Court. There appears to have been no question entertained for a moment of the competency of the High Court to call upon the appellant before them to make good the Court-fee required on the memorandum of appeal in the Lower Appellate Court, but it was held that the proper

(1) 13 P. R. 1901.

(2) (1898) I. L. R. 20 All. 362.

course was not to dismiss the respondents' appeal to the Lower Appellate Court, but to stay the execution of the decree, if any, of the High Court in favour of the respondent until such time as the additional court-fee due by him might be paid.

A somewhat similar case was dealt with in the appeal of *Madan Lal v. Jai Kishen Das* (1). In that case similarly it had been discovered in the High Court that the amount of Court-fee payable upon the memorandum of appeal in the Lower Appellate Court had been deficient. The appellant had been called upon to make good the deficiency. He neglected or refused to do so and the High Court dismissed the respondents' appeal to the Lower Appellate Court and restored the decree of the first Court. This case was not followed, in so far as concerns the procedure of dismissal of the appeal, in a case decided by the Full Bench of the same High Court in *Mohan Lal v. Nand Kishore* (2). In that case while the power of the High Court to call upon the appellant in the Lower Appellate Court to make good the deficiency in the Court-fee upon the memorandum of appeal in that Court was clearly presumed, it was held that the proper course was not to dismiss the appeal to the Lower Appellate Court on the ground that the deficiency of Court-fee had not been made good, but to withhold the execution of the decree in the respondents' favour in the Lower Appellate Court until such deficiency had been made good. It is to be noted that in that case the appeal was remanded to the Lower Appellate Court as the appeal had been decided upon a preliminary point.

It appears to me that the judgment in *Mohan Lal v. Nand Kishore* (2), was correct. When a Court of first instance, whose duty it is to see that the Court-fee stamps affixed to the plaint are of correct amount, proceeds to the trial of the suit, it must be assumed that the Court has decided that the amount of Court-fees paid is correct. It is at any rate a tacit decision and I think, though that point is not before us, that it would not be competent for either of the parties in the Appellate Court to raise any question as to the amount of fees paid in the first Court. But clearly under the second paragraph of section 12, it would be competent to the first Appellate Court to call upon a party, whose fee was in defect in the first Court, to make good such deficiency, or, if the order were not complied with within reasonable time to be fixed by the Court in accordance with section 10, paragraph (ii) of the Court-fees Act, to dismiss the claim of the plaintiff should it have been decreed in the

(1) *All. W. N.* (1905) 277.

(2) (1905) *I. L. R.* 28 *All.* 270 (*F. B.*).

first Court. Similarly as regards the Court of second appeal or further appeal, it will be competent to such Court to call upon a party who had appealed to the Lower Appellate Court after affixing an insufficient Court-fee upon his memorandum of appeal, to make good such deficiency on a penalty of having any decision in his favour in the lower Courts set aside.

I think the word "suit" in section 10, clause (ii) of the Court-fees Act, clearly includes "appeal" and that similar results in regard to the decision in the first appeal would follow from the action taken in the Court of second or further appeal to those which would result as regards the original suit under the orders of the Court of first appeal. My answer, therefore, to the reference is, when it is found in an Appellate Court that the Court-fee paid on a plaint or a memorandum of appeal, as the case may be, in the Court below is insufficient, and no dispute as to the amount has arisen and been specifically decided in such lower Court with reference to section 12 of the Court-fees Act, it must be held, if such lower Court has proceeded to the decision of the suit or appeal, that such Court has decided, under section 12 (i) of the Court-fees Act, upon the proper Court-fee to be levied. Such being the case the provisions of section 12, paragraph (ii) of the Court-fees Act, would apply, and the consequence of the action taken by such superior Court would be such as is provided for in section 10, paragraph (ii)—*i.e.*, if the Court-fee paid on a memorandum of appeal, as in this case, to the first Court of appeal is insufficient, it is competent in this Court to call upon the appellant in the first Court of appeal to make good the deficiency in the Court-fee on the memorandum of appeal in that Court, and on his failing to do so, to dismiss the appeal in that Court, should the appeal have been decided in his favour, after reasonable time has been allowed to make good such deficiency, or, in case the appeal in the Lower Appellate Court of the party appealing to this Court has been dismissed, to refuse to entertain his appeal to this Court until the deficiency is made good, a reasonable time being allowed for such purpose, after which, should the deficiency not have been made good, the appeal to this Court would stand dismissed.

SIR ARTHUR REID, C. J.—I concur in the answer proposed. 24th June 1912.
In the Allahabad Weekly Notes case of 1905 (1) cited, the Division Bench, Knox and Aikman, JJ. said, "on the 26th November 1903 it was brought to the notice of the respondents" "counsel that there was a deficiency in the fee that should

“ have been paid by his client, who was appellant in the Court below. Under section 12, clause (2) of the Court-fees Act, he was required to pay the additional fee. Time has been repeatedly given : on the last occasion a Bench of this Court, when allowing a fortnight more, said :—‘ No more ‘ time will be allowed.’ The fee has not been paid in. The result is that this appeal succeeds : the decree of the Lower Appellate Court is set aside with costs, and that of the Court of first instance restored.”

This decision is in my opinion strictly in accordance with the provisions of section 12 (*ii*) and section 10 (*ii*) of the Court-fees Act.

In the XXVIII Allahabad case (1) cited, the Full Bench held that the Weekly Notes case decision was not in accordance with the practice which previously obtained in the Court and the XX Allahabad (2) decision was followed :—

The Full Bench remarked that it was unnecessary to recapitulate the reasons recorded in XX Allahabad (2). The judgment in XX Allahabad ran thus :—

“ I am unable to see that I am authorized so to act (to dismiss the respondent-defendants’ appeal to the Lower Appellate Court) under the second clause of section 10. That clause provides, with reference to the valuation of the properties referred to in section 7, paragraphs (*v*) and (*vi*) of the Act, that when the Court-fees paid are insufficient under the circumstances laid down in the first clause of section 10, the Court shall call on the plaintiff to pay the deficient Court-fees and shall stay the suit until the additional fee is paid. It further provides that, if the additional fee be not paid, the suit shall be dismissed. The second paragraph of section 12 makes the procedure set forth in the second paragraph of section 10 applicable to the case when a Court of Appeal, Reference or Revision, considers the question decided under the first paragraph of section 12, has been wrongly decided to the detriment of revenue. The question then arises in the present case what is the *suit* which is to be stayed until the additional fee is paid, and it is to be noted that the staying of the suit is the act which the Court has to perform before it can dismiss the suit. There is no suit before me except in the sense that all proceedings in a suit up to decree are parts of the suit. What is before me is the appeal by the plaintiff against the decree of the Lower Appellate Court dismissing

“the suit. The appellant is undoubtedly no way in fault. He has paid up all the Court-fees due from him in the lower Courts and in this Court. Does then the second clause of section 10 mean that, because of the default of the respondent in the lower Court, the appellant is to have his appeal in this Court stayed, and can it be held that the second clause of section 12, read with paragraph 2 of section 10, means that, if the respondent wilfully persists in refusing to pay, the appellant, who is not in fault, is to be punished by having his appeal dismissed? I cannot believe that it was intended by the Legislature to work any such injustice. In my opinion the second clause of section 10, read with the second clause of section 12, cannot be worked in a case like the present. If it were the appellant who was in fault and failed to pay the full Court-fee due from him in the lower Court, this Court certainly could stay the hearing of his appeal, and, if the deficient fees were not paid, could dismiss his appeal, and no doubt would do so. But where the appellant is not in fault, it would be most unjust that the respondent by failing to pay the Court-fee due from him in the lower Court should have it in his power to prevent the appellant from having his appeal heard.

“For these reasons I decline in this case to take action under the second clause of section 10 and proceed to hear the appeal on the merits.”

This judgment was delivered several years before that reported in the Allahabad Weekly Notes (1) and with all deference to the learned Judge, for whose opinion I have always had the greatest respect, I am unable to find that any reasons have been recorded against the correctness of the course adopted in the Weekly Notes case, and it follows that the Full Bench recorded no reason for differing from the decision in the Weekly Notes case.

Section 12 (ii) of the Act provides that the Court shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and make the provisions of section 10 (ii) applicable. Those provisions are that the suit shall be stayed until the additional fee is paid and that, if the additional fee is not paid within such time as the Court shall fix, the suit shall stand dismissed. I see no reason to doubt that “suit” includes appeal and that the appeal of the defaulting

appellant in whatever Court must be dismissed, on his failure to make up the deficiency of Court-fee when called on to do so.

I concur in so much of the XX Allahabad decision (1) as laid down that it must be assumed, under the first paragraph of section 12 of the Court-fees Act, that the Lower Appellate Court finally decided between the parties that the fee paid was sufficient, and on this point I would over-rule 115 *P. R.* 1884 (*Mela Mal v. Harbhaj*) (2) which was merely followed in 13 *P. R.* 1901 (*Kaka Ram v. Ram Sarn*) (3) without any discussion, the point not having been seriously argued, no authority to the contrary having been cited and the Weekly Notes decision (4) and the XXVIII Allahabad decision (5) not having been pronounced.

SHAH DIN, J.—I agree.

No. 110.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

KAMIRA AND OTHERS—(PLAINTIFFS)—APPELLANTS

Versus

LALU AND OTHERS—(DEFENDANTS)—RESPONDENTS.

Civil Appeal No. 368 of 1910.

Punjab Tenancy Act, XVI of 1887, section 77 (3) (j)—suit for declaration in respect of right to collect village dues against persons claiming similar rights—jurisdiction—Civil or Revenue Court—Specific Relief Act, I of 1877, section 42 proviso—no bar to such suit—right not acquired merely by acquiring right to site of a house in the abadi.

Plaintiffs, proprietors of *Patti Kamal, Mauza Jamlera*, sued for a declaratory decree to the effect that they alone were entitled to collect village dues, such as *dhurt* in the *abadi* Bara Shahr.

Held, that a suit, such as this, between parties, each of whom claims to be entitled to collect the dues, does not fall within the purview of clause (j) of section 77 (3) of the Tenancy Act, when the persons from whom such dues are claimable are not parties to the suit.

204 *P. R.* 1889 (*Hayat Shah v. Jawaya*) (6), followed.

Held also, that the plaintiffs were not debarred by the *proviso* to section 42, Specific Relief Act, from suing for a mere declaration in respect of those dues.

Held further, that the mere fact that defendants had by adverse possession (if such had been proved) acquired proprietary rights to the sites in the *abadi* occupied by them, would not as a necessary consequence have given them all the rights possessed by the proprietary body of the *patti* in which that *abadi* is situate and the *onus* of proving the acquisition of such rights was consequently upon them.

(1) (1898) *I. L. R.* 20 *All.* 362.

(2) 115 *P. R.* 1884.

(3) 13 *P. R.* 1901 (p. 48).

(4) *All. W. N.* (1905) 277.

(5) (1905) *I. L. R.* 28 *All.* 270 (F. B.).

(6) 204 *P. R.* 1898.

Further appeal from the decree of A. H. Parker, Esquire, Officiating Divisional Judge, Gujranwala Division, dated the 25th February 1910.

Fazal Hussain, for appellants.

Duni Chand, for respondents.

The judgment of the Court was delivered by—

RATTIGAN, J.—Plaintiffs who are the proprietors of *patti* Kamal, in *mauza* Jamlera, sued for a declaratory decree to the effect that the *abadi* Bara Shahr belonged to them and that they alone were entitled to collect village dues, such as *dhart*, in the said area. 15th May 1912.

The persons impleaded as defendants were the proprietors of *patti* Lalu in the same village. Plaintiffs allege that some time ago the defendants lost their own *abadi* by river action, whereupon plaintiffs allowed them to settle with their *kamins* upon the aforesaid area known as Bara Shahr, but that plaintiffs continued to collect all village dues and cesses in this area until quite recently when defendants denied their right to do so. Hence the present suit.

Defendants met plaintiffs' claim with a flat denial and asserted that the aforesaid area was part and parcel of their own *patti* and that they had the exclusive right to collect the village dues and cesses.

The District Judge found that the area in question belonged originally to plaintiffs' *patti*, that defendants were allowed by plaintiffs to settle thereon, and that plaintiffs had, until just before suit, been realising the dues and cesses. He accordingly granted plaintiffs a declaratory decree to the effect that they were entitled to realise the proprietary dues such as *dhart*, etc., in the *abadi* known as Bara Shahr.

With this decree plaintiffs were perfectly content, but defendants appealed to the Divisional Judge and succeeded in getting the plaintiffs' suit dismissed.

The learned Divisional Judge agreed with the District Judge in finding that the *abadi* Bara Shahr was originally part of plaintiffs' lands in *patti* Kamal, but he held that plaintiffs' claim must fail on the following grounds, *viz.*, because

- (a) the defendants had by adverse possession or otherwise, obtained at least a share in the ownership of this *abadi* ;

- (b) as plaintiffs were not in possession, they were bound, under section 42, *proviso*, of the Specific Relief Act, to sue for consequential relief and could not claim a mere declaration ;
- (c) the suit was one cognizable by a Revenue Court (section 77 (3) (j) of the Punjab Tenancy Act) ; and
- (d) the evidence as to *dhart* dues having been taken by plaintiffs was not sufficiently strong in view of the fact that Lalu, defendant, as the Lambardar of the *abadi*, would have realised such dues.

He accordingly held that the *dhart* dues probably belonged to the plaintiffs and defendants jointly and that as a result the suit must be dismissed.

Plaintiffs have preferred a further appeal to this Court and after hearing counsel for them and for defendants-respondents we have no hesitation in agreeing with the conclusions of the Court of first instance.

It is, upon the findings of the Courts below, abundantly clear that this area formed part originally of plaintiffs' *patti* and the fact that at the recent settlement it has been recorded as *abadi-deh* proves nothing, and certainly does not show that the entries in the settlement records of 1858 and 1872 are incorrect. It seems to us clear that defendants were allowed by plaintiffs, as a matter of grace, to make use of this area for the purposes of an *abadi* when they lost their own *abadi* by submersion, and we are entirely unable to accept the Divisional Judge's finding that defendant's possession, which was unquestionably permissive in its inception, at some subsequent and unknown period, became adverse. But even if we assume that defendants by adverse possession became owners of the sites occupied by them and by their *kamins* in this area, we cannot on that account jump to the conclusion that they thereby became jointly entitled with plaintiffs to the dues and cesses leviable in that area. This was a claim which even defendants did not venture to prefer. They urged that they alone had the right to such dues, and this because the area belonged to their *patti* and not to *patti* Kamal. This allegation has been found, and quite rightly, to be false, and upon the finding that the area really belongs to *patti* Kamal, though the defendants may not be removeable from the sites occupied by them—a point upon which we give no opinion, the obvious inference is that plaintiffs alone have the right to collect all dues within the said area. Plaintiffs have never seriously denied the right of

defendants to occupy the sites in this area which they already are in possession of, and it was for this reason that they did not press their claim for a declaration that they were the owners of these sites. Their real claim was for a declaration of their right to collect the dues and they appear to have dropped any claim to other relief at the very outset of the case. The proviso to section 42 of the Specific Relief Act would certainly not debar them from asking for a declaration as to their right to these dues, and it is obvious that both the parties themselves and the District Judge understood that this was the only question involved in the case. We hold, therefore, that plaintiffs' suit for the declaratory decree was good so far as their claim to the right to collect the dues and cesses was concerned and that the mere fact that defendants had by adverse possession (if such had been proved) acquired proprietary right to the sites in the *abadi* occupied by them would not, as a necessary consequence have given defendants all the rights possessed by the proprietary body of the *patti* in which that *abadi* is situate.

Defendants attempted to prove that they had been actually realising these dues in times past, but apart from the oral evidence which is, as the District Judge rightly says, worthless, it is clear from the documentary evidence that it was only in S. 1964 (*i.e.*, 1907) that they attempted to make any such realisations and in 1907 the dispute had already arisen between them and plaintiffs. On the other hand the documentary evidence adduced by plaintiff proves that ever since S. 1950, these dues have without demur been realised by them alone. We cannot agree with the Divisional Judge that this important evidence is to be ignored, simply and solely because Lalu, one of the defendants, is a Lambardar who resides in *abadi* Bara Shahr and would therefore realise the dues for himself and his co-defendants. He may have done so in S. 1964 (1907) after the dispute arose, but the documentary evidence shows clearly enough that he did not realise these dues for his party prior to that year.

Finally, as to the suit being one cognizable by a Revenue Court, we need say no more than that we agree with Rivaz, J.'s opinion as expressed in No. 204 P. R. 1889 (*Hayat Shah v. Jawaya*) (1), that clause (j) of section 77 (3) of the Tenancy Act applies only to suits between the person who claims such dues and cesses and the person by whom such dues and cesses are alleged to be payable. A suit between parties, each of

whom claims to be entitled to collect such dues, does not fall within the purview of that clause, when the persons from whom such dues are claimable are not parties thereto.

We hold, therefore, that the decree of the District Judge was correct and accepting this appeal, we set aside the decree of the Divisional Judge, and grant plaintiffs a declaratory decree in the terms set forth in the District Judge's decree. Defendants will pay costs throughout.

Appeal accepted.

No. 111.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Rattigan.*

INDIAN GENERAL NAVIGATION AND RAILWAY
Co., CALCUTTA—(DEFENDANT)—APPELLANT
Versus
HARCHARAN DAS—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 318 of 1910.

Indian Railway Act, IX of 1890, sections 3 (4) (d), 3 (5) and 80—suit for damages for loss to through booked traffic—which railway administration can be sued and where—jurisdiction—Civil Procedure Code, 1882, section 17, explanation III.

The plaintiff brought two suits against the defendant for damages on account of the loss sustained by him in consequence of detention of his goods by the latter and fall in market price of those goods during such detention and for recovery of sums unlawfully recovered from him by defendant in respect of surcharge and demurrage.

The goods consisted of consignments of gram, *munghi* and wheat, which plaintiff had delivered to the N.-W. Railway at Ludhiana for carriage to Bairab in Eastern Bengal. The lines of various Railway Companies were used and the goods conveyed to Goalundo by the Eastern Bengal State Railway and thence to Bairab by boat by the defendant company, whose head office is in Calcutta.

Held, that having regard to the definitions of "railway" in section 3 (4) (d) of the Railway Act and of "Railway administration" in section 3 (5), the defendant company was a Railway administration on whose railway the loss complained of occurred within the meaning of section 80 and plaintiff under that section had the option of suing either the North-Western Railway or the defendant company.

Held also, that the words "loss, destruction or deterioration" of goods in section 80 cover a loss by fall in market price.

6 P. R. 1897 (*Changa Mal v. Bengal N.-W. Railway Co.*) (1), referred to.

Held further, that under section 17, explanation III of the Civil Procedure Code, 1882, the suit could be filed where the contract was made, i.e., at Ludhiana.

Further appeal from the order of T. P. Ellis, Esquire, Divisional Judge, Ludhiana Division, at Ferozepore, dated the 8th December 1909.

Oertel, for appellant.

Muhammad Shafi, Obedulla and Ghulam Rasul, for respondent.

The judgment of the Court was delivered by—

SIR ARTHUR REID, C. J.—A preliminary objection, that 13th May 1912.
no appeal had been filed from the decree dismissing the appellants' appeal against the decree of the Court of first instance of the 31st May 1909 for Rs. 384-15-4, had admittedly no force and was overruled at the hearing.

This appeal and Civil Appeal No. 319 of 1910 can be disposed of together the points involved being practically identical. The respondent, Harcharan Das, sued the appellants, the Indian General Navigation and Railway Company, Limited, Calcutta, for damages on account of the loss sustained by him in consequence of detention of his goods by the appellant company and fall in the market price of those goods during such detention, and for recovery of sums unlawfully recovered from him by the appellant company in respect of surcharges and demurrage. The principal plea set up is that the Ludhiana Court, in which the suit was instituted, had no jurisdiction but, as remarked by the Lower Appellate Court, the appellant company never pleaded that it was not a Railway Company amenable to the jurisdiction of the Court under the Railways Act and it has throughout described itself as a Railway Company. The goods in respect of which the suit was filed were delivered to the North-Western Railway Company at their station at Ludhiana for carriage to Bhairab in Eastern Bengal. The lines of various Railway Companies were used and the goods were conveyed to Goalundo by the Eastern Bengal State Railway and were conveyed thence by the appellant company to Bhairab by boat.

"Railway" and "Railway Company" are defined in section 3 (4) and (5) of the Indian Railways Act, IX of 1890. Section 3 (4) (d) includes in the definition of "Railway" all ferries, ships, boats and rafts used on inland waters for the purposes of the traffic of a Railway and belonging to or hired or worked by the authority administering the Railway. Under section 80 of the Act the plaintiff could either sue the Railway administration to which the goods

were delivered or the Railway administration on whose railway the loss, injury, destruction or deterioration complained of occurred. Under section 17, explanation III of the Code of Civil Procedure of 1882, in force when the suit was filed, the cause of action arose, and the suit could be filed, at the place where the contract was made. We have no hesitation in holding that the contract was made at Ludhiana. The railway receipt entitling the respondent to carriage of the goods to Bhairab was made over to him at Ludhiana and payment for it was made at Ludhiana.

It was contended for the appellant company that under exhibit A, articles of agreement entered into in 1903 between the Eastern Bengal State Railway on the one side and the Indian General Navigation and Railway Company and the Rivers Steam Navigation Company on the other side each company is responsible to the other but not to the public. Article 18, however, is as follows :—

“ All loss, injury or damage of any kind and all claims for goods, cargo or parcels shall thus be settled by the party with whom the goods, cargo or packages were at the time when the loss or injury occurred from which the claims arose. But where it cannot be ascertained with certainty where the loss or injury arose the claim shall be divided in proportion to the amount of freight to which each party would be entitled under clause 8, but in such cases no claims shall be admitted or paid without the consent of both parties.”

Even if it were held that the respondent was aware of this agreement it would not, in our opinion, relieve the appellant company of liability to him in this suit. It has not, however, been pleaded that he had a notice of this agreement and he is not, in our opinion, bound by its terms.

It has further been contended for the appellant company that section 80 of the Act does not contemplate decrease in the market price of the goods and No. 6 P. R. 1897 (*Changa Mal v. Bengal N.-W. Railway Company*) (1), which has been cited in support of this contention, does not materially help the appellants, as page 26 of the report runs :—

“ The exact meaning of the word “loss” which is in issue in the case is perhaps to a certain extent liable to be obscured by the discussions regarding it in some of the reported cases. It has been held for example to cover a loss of season or “market ;”

and authority is cited for this interpretation.

The question before the Court in that case really was whether section 77 of the Railway Act barred a suit for damages for negligent misdelivery of goods to a person other than the owner, by reason of notice not having been given to the Railway administration within six months of the loss. The plaint in the present suit alleges delivery to the Railway Company at Ludhiana on the 17th September 1906 and notice to defendants on the 15th January 1907, *i.e.*, within six months. These allegations are not now denied. We see no reason for doubting that deterioration in section 80 includes decrease in market value consequent on detention.

It is admitted that the goods in suit were conveyed by the appellant company from Goalundo to Bhairab and on the pleadings we are satisfied that section 80 of the Railway Act applies. *Nur-ul-Hossein v. Sheo Sahai Lal* (1), 39 P. R. 1900 (*Chuni Lal v. Mussammat Amir Bibi*) (2), 74 P. R. 1902 (*Muhammad Anwar-ul Haq v. Habib-ul Rahman*) (3) and 88 P. R. 1902 (*Hans Raj v. Gunga Ram*) (4), are authority, if authority were necessary, for the proposition that the appellants cannot at this stage plead that they are not a Railway Company within the terms of section 80 of the Act.

On the facts we concur with the courts below that the appellants were liable to the respondent for loss caused him by the detention at Bhairab and that they were not entitled to demand demurrage or surcharge from the respondent. At the same time we cannot concur in so much of the Lower Appellate Court's judgment as makes the appellants liable for detention at Goalundo, at the beginning of the judgment in Civil Appeal No. 326 of 1909, the subject of Civil appeal No. 319 of 1910 before us, the Lower Appellate Court says :—

“The consignment in question reached Goalundo on 12th November 1906 and Bhairab on the 11th January 1907, so far “the defendant company was not to blame,” and further on the judgment runs :—

“I find that the delay at Goalundo was presumably due ‘to “the defendant company's default.”

We are unable to concur in the reasons recorded for this change of opinion and we concur with the Court of first instance in the conclusion that the only detention for which the appellants were liable was at Bhairab. The Lower Appellate Court was, however, correct in increasing the amount of surcharge recoverable by the respondent to Rs. 37-2-9 more in each case than was allowed by the Court of first instance.

(1) (1892) I. L. R. 20 Cal. 1 (P. C.).

(2) 39 P. R. 1900 (p. 146).

(3) 74 P. R. 1902 (pp. 234 and 295).

(4) 88 P. R. 1902 (P. B.) (p. 372).

We therefore modify the decree of the Lower Appellate Court in this appeal by deducting Rs. 233-14-9 from the amount decreed, and in Civil Appeal No. 319 of 1910 by deducting Rs. 195 from the sum decreed. To this extent only the appeals are decreed but, having regard to the course of the litigation, the appellants will pay the whole of the respondent's costs.

Appeals accepted.

No. 112.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Chevis.

**MUSSAMMAT ROSHNAI KHANAM AND ANOTHER—
(PLAINTIFFS)—APPELLANTS**

Versus

**NAWAB KHAN AND OTHERS—(DEFENDANTS)—
RESPONDENTS.**

Civil Appeal No. 329 of 1911.

Custom—succession—by widows and unmarried daughters in presence of sons—Khattars—Fatehjang Tahsil, Attock District—Riwaj-i-am—maintenance.

Held, that it had not been proved that by custom among Khattars of the Fatehjang Tahsil, Attock District, widows and unmarried daughters succeed to an equal share along with sons—the *onus probandi* being upon the widows and daughters.

Held also, that the maintenance to be allowed to the widows and daughters should not be a bare sufficiency but that the ladies of the families should be maintained in fitting circumstances, having regard to the value of the estate.

First appeal from the order of Iala Poku Ram, District Judge of Attock, dated the 22nd day of December 1910.

Jalal-ud-Din, for appellants.

Gobind Das, for respondents.

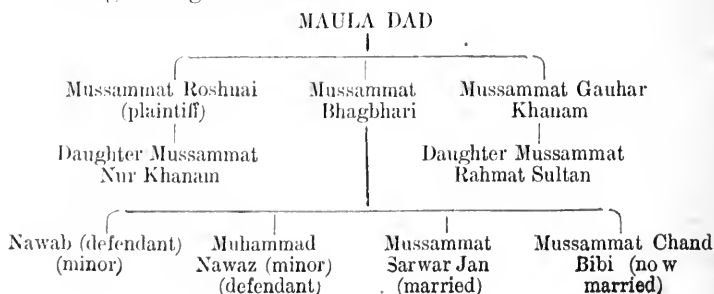
The judgment of the Court was delivered by—

11th May 1912.

CHEVIS, J.—This judgment will cover the connected appeals Nos. 934 and 935 of 1911.—

Maula Dad had 3 wives, Roshnai, Bhag Bari and Gauhar Khanam.

The genealogical tree is —



The plaintiffs Mussammat Roshnai and her daughter Mussammat Nur Khanam sue for $\frac{1}{4}$ th of the estate, alleging that by custom of the Khattars of that part of the Punjab, Fatehjang *Tahsil*, (now in the Attock District but formerly in the Rawalpindi District) widows and unmarried daughters inherit equally with sons. Apparently at date of institution there were three widows, three unmarried daughters and two sons, and so the claim was for $\frac{2}{5}$ th of the estate, but we are informed that Mussammat Gauhar Khanam has remarried and Mussammat Chand Bibi is also married now.

The first Court held the alleged custom unproved, but gave a decree for $\frac{1}{5}$ th of the cultivated land as maintenance.

* * * * *

The first question for consideration is whether by custom amongst Khattars of the Fatehjang *Tahsil* widows and unmarried daughters get an equal share along with sons. This is certainly not in accordance with the general custom of the Province and the burden of proving the special custom set up, lies on the plaintiffs.

Oral evidence of the usual class has been produced, but plaintiffs' counsel has not touched on it, and simply relies on the printed Customary Law of the Rawalpindi District, prepared by Mr. Robertson in the second revised settlement. According to questions 19 and 20 unmarried daughters take equally with their brothers and a widow shares equally with her sons. But we must see how far this is corroborated by instances. Turning to pages 42 and 43 we find the instances of daughters. In the first three instances it would appear that the last male owner left no sons. The next two are cases of *Musalla Nishins* (women vowed to celibacy). The sixth is certainly a case of a daughter sharing with her three brothers, but this is a case amongst Gakkhars and the *tahsil* is not mentioned. The seventh is a case of a *Musalla Nashin*, and apparently she had no brothers. The eighth is the only case of Khattars; here too the girl was vowed to celibacy and apparently she had no brothers, and took her father's whole estate. In fact all through the list there appear only three cases of daughter's sharing with their brothers, and the only case amongst Khattars is, as already noted, one of a *Musalla Nishin* who apparently had no brothers.

Turning to pages 44 and 45 we get several instances of widows sharing equally with sons, but only one instance amongst Khattars is cited, and that is a case in the Rawalpindi *Tahsil*.

Turning now to the Customary Law of the Attock District prepared by Mr. Kitchin at the recent settlement, it may be noted in the first place that though the Rawalpindi and Attock Districts adjoin, there seems to be a considerable difference of custom generally, *e.g.*, on page 2 we read that the *chundewand* custom has a considerable following in the Rawalpindi District whereas in the Attock District the *pagwand* custom has the field almost entirely to itself.

On page 20 we read that the replies of the various tribes as to the rights of unmarried daughters to share in the inheritance are not satisfactory, but that there is a preponderance of opinion in favour of the view that, in the presence of male issue, daughters, whether *Musalla Nishin* or not, do not share in the inheritance, though unmarried daughters are entitled to maintenance, and a few cases are quoted in which *Musalla Nishins* shared equally with their brothers. Excluding *Musalla Nishins*, not a single case is quoted of a daughter sharing with her brothers.

On page 21 the right of the widow to share with her sons is dealt with, and it is stated that it is doubtful "if any really well established custom exists, so varied are the opinions of the tribes, but that as a general rule the question scarcely arises, the widow living as a matter of course with her sons, the property in such cases may be entered jointly in the name of mother and sons or only in the names of the sons; but the practical effect is the same. When the question does arise the majority of tribes agreed at last settlement that the widow will share for life equally with her sons but without power of alienation. The majority are now in favour of allowing her maintenance only, a portion of the property being specially set aside for this purpose. Examples are quoted in favour of both theories, and Courts will have to consider the circumstances of each case in the absence of well established custom on this point."

On page 23 five instances relating to Khattars are cited, of which the fourth is not in point as there was no male issue. In three out of the other four cases the widow got only maintenance (in two cases a portion of land was assigned, and in one case the form of maintenance is not specified) while in the fourth case it is simply said that the widow resided with the sons. Not a single instance is cited of a Khattar widow taking a share along with the sons.

It is sufficient to state that we find there is no proof of any custom amongst Khattars whereby a widow, or an unmarried

daughter takes a share with the sons. The case of a daughter vowed to celibacy is a peculiar case with which we are not now concerned; plaintiff's counsel states that Mussammat Nur Khanam is not a *Musalla Nishin*.

That the widow and daughter are entitled to maintenance is not denied, and the only question remaining for decision is the form and extent of this maintenance. In our opinion the best way of avoiding trouble is to set aside certain land for the maintenance of the plaintiffs and this is the course which is locally approved, to judge by the remarks already quoted from Mr. Kitchin's volume of Customary Law. In addition we think a small regular cash allowance should be made, to meet occasions when the ladies require a little ready money.

The estate is a considerable one, and the ladies of the family should be maintained in fitting circumstances; it is not sufficient to provide them simply with the bare necessities of life. On the other hand we must not burden the estate too heavily.

* * * * *

[The remainder of the judgment is not required for the purposes of this report.]

No. 113.

Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.

Mr. Justice Rattigan.

ILAHİ BAKHSH—(PLAINTIFF)—APPELLANT

Versus

RAHİM BAKHSH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 1141 of 1911.

Custom—succession by widows and daughters in presence of sons—Muhammadan Sheikhs, Delhi City—Muhammadan Law.

Held, that it had not been proved that a custom prevailed among Muhammadan Sheikhs, labourers and artizans, of Delhi City, excluding the widow and daughters of the last male owner from succession to his property in favour of his sons.

140 P. R. 1908 (*Mchtab-ud-Din v. Abdullah*) (1) and 23 P. R. 1897 (*Mussammat Fakhar-un-Nissa v. Malik Rahim Bakhsh*) (2), referred to.

Further appeal from the order of C. F. Usborne, Esquire, Divisional Judge, Delhi, dated 12th August 1911.

Zia-ud-Din for appellant.

Shah Nawaz for respondents.

The judgment of the Court was delivered by—

29th April 1912.

RATTIGAN, J.—Admittedly the only question before us in this further appeal is whether the parties are governed by Muhammadan Law or by some custom peculiar to their brotherhood. They are Muhammadan Sheikhs of Delhi City, and it appears that their ancestors came originally from Didwana, a town between Bikanir and Jaipur. There are about 300 families of this brotherhood in Delhi, mostly poor and engaged in such work as that of box-making, building, leather manufacture and the like. They are described as labourers and artisans by the Divisional Judge, and it is admitted that no one of them is in any sense an agriculturist.

The plaintiff's contention is that by the peculiar custom of this brotherhood a widow and daughters are excluded from succession to any property in the presence of sons of the late proprietor. The Courts below have concurred in finding that this alleged custom has not been proved and they have consequently dismissed plaintiff's suit with costs.

The plaintiff has preferred a further appeal to this Court, and we have heard his pleader at some length in support of his contentions but we agree with the findings of the Courts below. Despite an *obiter dictum* of one of the learned Judges in No. 140 P. R. 1908 (*Mehrab-ul-Din v. Abdullah*) (1), we are of opinion, following No. 23 P. R. 1897 (*Mussammat Fakhar-un-Nissa v. Malik Rahim Bakshi*) (2), that the *onus probandi* was upon plaintiff to establish the custom set up by him, and after hearing all that Mr. Zia-ud-Din had to urge, we find practically nothing of any definite value upon the record to support the claim.

The oral evidence on the one side about evenly balances, the oral evidence on the other side, and the documentary evidence, exhibits P. 1 and P. 2, relied upon by the plaintiff are at best exceedingly vague and unsatisfactory, it may be that in certain cases a widow or a daughter has been induced or compelled by the male members of a particular family to forego the share in the property to which she would under the Muhammadan Law have been entitled, but such cases cannot be said to establish a peculiar custom opposed to the principles of the personal law of the parties.

For these reasons we found it unnecessary to call upon the counsel for the respondents and dismissed the appeal with costs.

Appeal dismissed.

(1) 140 P. R. 1908.

(2) 23 P. R. 1897.

No. 114.

*Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice
Scott-Smith.*

LACHHMAN DAS AND OTHERS—(DEFENDANTS)—

APPELLANTS

Versus

DYAL DAS AND OTHERS—(PLAINTIFFS)—

RESPONDENTS.

Civil Appeal No. 294 of 1911.

*Punjab Pre-emption Act, II of 1905, section 22—price paid and fixed in
good faith—market value—Punjab Laws Act, section 16.*

Held, that under section 22, Punjab Pre-emption Act 1905, it is sufficient for the Court to find that the price was fixed in good faith to shut out all enquiry into the market value, and thereupon the price so fixed must be fixed by the Court as the price for the purposes of the suit, no matter whether it is more or less than the market value.

The change of language between section 16, Punjab Laws Act, and section 22, Punjab Pre-emption Act, discussed.

13 P. R. 1908 (*Niadar Mal v. Mukh Ram*) (1) and 47 P. R. 1909 (*Hoa Ram v. Rana Palia*) (2), followed.

*First appeal from the decree of F. B. R. Spencer, Esquire, District
Judge, Multan, dated 30th January 1911.*

Balwant Rai, for appellants.

Muhammad Shafi, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—This appeal has arisen out of a suit brought 24th April 1912.
by the plaintiff-respondent, Dyal Das, against the defendants-respondents for possession by pre-emption of two houses situate in the city of Multan, which were sold by defendant-respondent Dukh Bhanjan Das to the appellants by a registered deed dated the 31st May 1908, for the sum of Rs. 7,500. It is unnecessary to notice here the pleadings of the parties or the issues which were framed by the District Judge with reference to those pleadings, as the sole question for decision in this appeal is whether or not the price entered in the sale-deed, *i.e.*, Rs. 7,500 was paid or fixed in good faith. The sale-deed shews that the consideration for the sale was made up of the following three items :—

	Rs.
(1) Due to prior mortgagees ...	3,564
(2) Paid before the Sub-Registrar ...	3,836
(3) Stamp and registration expenses ...	100
Total ...	7,500

It is not disputed that Rs. 3,564 was due to prior mortgagees, and it is proved that Rs. 3,836 was paid by the vendees to the vendor before the Sub-Registrar. The actual payment of the price to the vendor is thus satisfactorily established; but the pre-empter alleged in the Court below that of the amount paid before the Sub-Registrar Rs. 3,500 was returned by the vendor to the vendees; and in support of that allegation he produced two witnesses Lal Chand and Labha Ram, whose evidence is printed at page 70 of the paper-book. All that they say is that after the registration of the sale-deed had been effected, the vendor came out of the office of the Sub-Registrar and returned two bags of money containing about Rs. 2,000 to Lala Hem Ram, who then represented the vendees. This evidence is absolutely worthless, and the District Judge has disbelieved it (page 76). The District Judge must therefore be held to have found that the whole price entered in the sale-deed had been actually paid by the vendees to the vendor, though he does not record a finding to that effect in so many words. He disbelieves the evidence as to the alleged return of part of the consideration money by the vendor to the vendees' agent, and yet he thinks that because the market value of the houses in suit is not more than about Rs. 5,000, therefore the whole amount of Rs. 7,500 entered in the sale-deed could not have been paid or fixed as the price of the houses in good faith. That being his view, he has fixed as the price of the houses their market value, namely, Rs. 5,000, and has decreed the plaintiff-respondent's claim conditional on payment of that amount to the vendees.

We think that the District Judge has taken an erroneous view of the case. We agree with him that the evidence as to the alleged return of part of the price by the vendor to the vendees after registration is beneath notice, and we hold that the whole consideration money, Rs. 7,500 passed to the vendor. That being so, we were of opinion, following 13 *P. R.* 1908 (*Niadar Mal v. Mukh Ram*) (1) and 47 *P. R.* 1909 (*Hoa Ram v. Rana Palia*) (2), that the price at which the sale purports to have taken place had been fixed in good faith, and under section 22 of the Pre-emption Act that price must be fixed as the price for the purposes of the suit. According to that section the question of the market value of the property sold has to be gone into only if the Court finds that the price entered in the sale-deed was not paid or fixed in good faith. If the Court finds that the price was paid or fixed in good faith, it is

(1) 13 *P. R.* 1908.(2) 47 *P. R.* 1909.

precluded from considering and deciding the question of the market value of the property, and is bound to hold that the price so paid or fixed is the price which the pre-emptor must pay to the vendee as a condition precedent to his obtaining possession of the subject-matter of the suit.

The learned Counsel for the plaintiff-respondent has contended that in view of the wording of section 22 of the Punjab Pre-emption Act the decisions of this Court passed before that Act came into force, which were to the effect that if the price entered in the sale-deed was actually paid, it must be held to have been fixed in good faith although it was considerably above the market value, were no longer applicable to a case like the present; and he has argued that the words used in sub-section (1) of the said section, namely, "Whether the price.....has been *paid or fixed in good faith*" clearly indicate that the legislature intended to effect a change in the law as interpreted by the said decisions. We do not see our way to accept this contention. The words used in section 16 of the Punjab Laws Act with reference to which the decisions in question were passed were—"If in the case of a sale the Court finds that the price was not fixed in good faith.....", whereas in section 22 of the Pre-emption Act the words used are—"If it (the Court) finds that the price "was not so "paid or fixed (*i.e.*, paid or fixed in good faith)....." The only difference therefore between the relevant clauses of the two sections is, that whereas section 16 of the old Act merely referred to the price not being *fixed* in good faith, section 22 of the new Act speaks of the price not being *paid or fixed* in good faith. The use of the disjunctive "*or*" in the new section is significant, inasmuch as it shews that the question of the market value of the property sold will only be gone into if the Court finds *either* that the price was not *paid* in good faith *or* that it was not *fixed* in good faith. So that for the purposes of shutting out all enquiry into the market value, it is sufficient for the Court to find that the price was fixed in good faith, in which case the price so fixed must be fixed by the Court as the price for the purposes of the suit. Under the new Act, therefore, if the price entered in the deed was paid in good faith, or if it was fixed in good faith, in either case the question of the market value of the property cannot be gone into by the Court trying the suit; and according to a uniform current of recent decisions in this Court if the price mentioned in the deed of sale is actually paid to the vendor, no matter whether it is more or less than the market value of the property sold, it must be held to have been fixed in good faith and it

must be paid by the pre-emptor to the vendee. Notwithstanding therefore the change of language in section 22 of the new Act, the decisions of this Court passed with reference to section 16 of the Punjab Laws Act still hold good, as has been held in effect in 13 P. R. 1908 (*Niadar Mal v. Mukh Ram*) (1) and 47 P. R. 1909 (*Hoa Ram v. Rana Palia*) (2), which were decided after the Punjab Pre-emption Act came into force.

For the above reasons, we hold that the price entered in the sale-deed dated the 31st May 1908, namely, Rs. 7,500 was fixed in good faith and the District Judge was therefore not justified in going into the question of the market value of the property sold. We accept the appeal, and in modification of the decree of the District Judge we increase the amount payable by the plaintiff-respondent to the defendants-appellants from Rs. 5,000 to Rs. 7,500. Rs. 5,000 has already been paid into Court by the plaintiff-respondent, and he must pay the balance Rs. 2,500 on or before the 24th June 1912, failing which, his suit shall stand dismissed with costs throughout. The order of the District Judge as to costs will stand, but in this Court the plaintiff-respondent will pay all the costs of the defendants-appellants except the pleader's fee. We disallow the pleader's fee to the appellants because Lala Balwant Rai who appeared for them did so on behalf of Mr. Shadi Lal who was engaged before another Bench of the Court, merely to ask for an adjournment of the case. The hearing could not, however, be adjourned; and though Lala Balwant Rai tried to argue the appeal he could not be of much assistance to the Court as he had not had time to prepare the case. He was in no way to blame, but we cannot in justice to the respondent allow pleader's fee to the appellants. The cross-objections filed by the plaintiff-respondent are dismissed.

Appeal accepted.

No. 115.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Scott-Smith.

DHAN SINGH AND OTHERS—(PLAINTIFFS)—
APPELLANTS

Versus

KAHN SINGH AND OTHERS—(DEFENDANTS)—
RESPONDENTS.

Civil Appeal No. 347 of 1911.

Specific Relief Act, I of 1877, section 21, last clause—agreement to submit to arbitration made out of Court during pendency of suit—no bar to

suit—*Civil Procedure Code*, 1882, sections 506, 523 and 525—*Civil Procedure Code*, 1908, schedule 2, sections 1, 17 and 20.

Held, that during pendency of a suit, it is not competent to the parties to refer the matter in dispute to arbitration without the intervention of the Court, and, after an award has been made by the arbitrators, to apply to the Court that the award be filed.

Held also, that sections 523 and 525 of the old Code and the corresponding sections 17 and 20 of schedule II of the new Code apply only to cases where there is no pending litigation.

Held further, that the last clause of section 21 of the Specific Relief Act does not apply to an agreement to refer to arbitration made during the pendency of a suit, and the Court can not take cognizance of arbitration proceedings to which its sanction has not been accorded in the manner laid down in section 506 of the old Code or section 1, schedule II of the new Code.

130 P. R. 1882 (*Budha v. Haku*) (1), 50 P. R. 1891 (*Fakir v. Jaimal*) (2), 25 P. R. 1902 (*Ghulam Jilani v. Muhammad Hassan*) (3), *Khatija v. Ismail* (4), *Tincowry Dey v. Fakir Chand Dey* (5) and *Kubra Jan v. Ram Bali* (6), referred to.

Harivalabdas Kalliandas v. Utamechand Manekchand (7), *Salig Ram v. Jhanna Kuar* (8), *Sheoambar v. Deodat* (9) and *Sheo Dat v. Sheoshankar Singh* (10), dissented from.

Further appeal from the decree of H. A. Rose, Esquire, Additional Divisional Judge, Ferozepore Division, dated the 17th November 1910.

Duni Chand, for appellants.

Lajpat Rai, for respondents.

The judgment of the Court was delivered by—

SHAH DIN, J.—

* * * * *

15th May 1912.

The facts so far as they are material to the decision of this appeal are briefly as follows. On the 24th February 1908 the plaintiffs instituted their suit in the Court of the Munsif, 1st class, for possession by inheritance, of a half share of certain landed and house property left by a collateral relation of theirs, named, Parsanna Singh, and they impleaded as defendants certain other heirs of Parsanna Singh entitled to the remaining half of the property and also certain alienees from Parsanna Singh. In the course of the suit after the defendants had filed their written statements and the issues were framed by the Court, two of the defendants, who were co-heirs with the plaintiffs to Parsanna Singh's property, namely, Kalu Singh

(1) 130 P. R. 1882.

(2) 50 P. R. 1891.

(3) 25 P. R. 1902 (P. C.).

(4) (1889) I. L. R. 12 Mad. 380 (386).

(5) (1902) I. L. R. 30 Cal. 218 (228).

(6) (1908) 5 All. L. J. R. 617 (653) see also I. L. R. 30 All. 560 (P. B.).

(7) (1879) I. L. R. 4 Bom. 1.

(8) (1882) I. L. R. 4 All. 546.

(9) (1886) I. L. R. 9 All. 168.

(10) (1904) I. L. R. 27 All. 53.

and Gunna Singh, made an application asking for an adjournment of the case on the ground that the parties were contemplating a compromise. The hearing was accordingly adjourned to the 28th of April 1908, and on that date an application was filed by Kahn Singh stating that the matter in dispute between the parties had been referred to the arbitration of five persons on the 25th March 1908, that an award which consisted of an entry made by them in the *bahi* of one Harnama Mal had been given by the said arbitrators, and that according to the award the defendants were entitled to receive from the plaintiffs Rs. 1,171 before giving up possession of the land. A transliteration of the entry in the *bahis* was filed along with the application. This application was ignored by the Court and the case was proceeded with ; and after the evidence produced by the parties had been taken down the Court proceeded to judgment on the 24th June 1908, and gave the plaintiffs a decree for possession of a half share of the land claimed on payment of Rs. 863-3-6. From the decree of the Munsif both parties appealed to the Divisional Court ; and the Divisional Judge remanded the case under order XLI, rule 23, Civil Procedure Code, for a fresh decision holding that there had been no proper trial of the suit, as no issue had been framed on the alleged reference to arbitration and the delivery of the award by the arbitrators which were relied upon by the defendants in the course of the suit. On the case coming back to him, the Munsif allowed the parties to put in fresh pleadings ; and upon those pleadings he framed 8 issues which are printed at page 4 of the paper-book. The third issue which is the only issue with which we are now concerned runs as follows :—

“ Did the plaintiffs refer the matter in dispute to arbitration ; did they (the arbitrators) make any award ; and is it “ valid and binding on the plaintiffs ? ”

Upon that issue the Munsif held that the parties could not refer the matter in difference between them to arbitration during the pendency of the suit in Court. He also held that there was no written agreement to refer to arbitration ; that all the parties did not make the reference ; that no proper enquiry was made by the arbitrators ; and that they had made no proper award. He was accordingly of opinion that the plaintiffs were not bound by the award ; and he therefore decided the suit on the merits with reference to the other issues framed by him, with the result that a decree for possession of the property in dispute was granted to the plaintiffs on payment of Rs. 660. On cross-appeals being filed by the parties, the

Divisional Judge, Mr. T. P. Ellis, remanded the case under order XLI, rule 25, Civil Procedure Code, for further inquiry as to whether a certain sum of money had been raised by Parsanna Singh for legal necessity, and a return was duly made to the order of remand by the Munsif. The appeals came on for final hearing before another Divisional Judge, Mr. H. A. Rose, and without going into the merits of the case, he held that the award of the arbitrators filed in the Court of the Munsif by the defendants on the 28th April 1908 was valid and was binding upon all the plaintiffs, though one of them Dhan Singh had not been a party to the agreement to refer to arbitration. The learned Judge accordingly accepted the defendants' appeal and granted the plaintiffs a decree in terms of the award, that is to say, he gave them a decree for possession of the property in suit on payment of Rs. 1,171 to the defendants.

The plaintiffs have preferred a further appeal to this Court; and the first question for decision is, whether during the pendency of the suit in the Court of the Munsif it was open to the parties to refer the matter in dispute to arbitration without the intervention of the Court and, after an award had been made by the arbitrators, to apply to the Court that the award be filed. The point is not free from difficulty; but after giving our best consideration to the matter, we think that the answer to the question must be in the negative. In support of this view we may refer to the decisions of this Court reported as No. 130 *P. R.* 1882 (*Budha v. Haku*) (1) and No. 50 *P. R.* 1891 (*Fakir v. Jaimal*) (2), as also to the observation of their Lordships of the Privy Council in No. 25 *P. R.* 1902 (*Ghulam Jilani v. Muhammad Hassan*) (3) and to the opinion expressed by Maclean, C. J., in *Tincowry Dey v. Fakir Chand Dey* (4). The opposite view is supported by *Harivalabdas Kallianas v. Utamchand Manekchand* (5), *Salig Ram v. Jhunna Kuar* (6) and *Sheo Dat v. Sheoshankar Singh* (7).

In No. 130 *P. R.* 1882 (*Budha v. Haku*) (1) the parties to a pending litigation had referred the subject-matter of the claim to arbitration by an agreement which they had executed out of Court. No application was made to make this reference a rule of Court, nor was any proceeding taken by either party to cause the agreement to be filed under section 523 of the Code of Civil Procedure, 1882. At the hearing of the suit the

(1) 130 *P. R.* 1882.(2) 50 *P. R.* 1891.(3) 25 *P. R.* 1902 (*P. C.*).(4) (1902) *I. L. R.* 30 *Cal.* 218 (228).(5) (1879) *I. L. R.* 4 *Bom.* 1.(6) (1882) *I. L. R.* 4 *All.* 546.(7) (1904) *I. L. R.* 27 *All.* 53.

defendant pleaded the agreement as a bar to its further maintenance, and the Court finding that both parties had made the agreement to refer, dismissed the suit, leaving either party to take such action as he might be advised under section 523 of the Code. It was held by this Court that the only bar which a reference to arbitration, which had not been made a rule of Court, could be said to create was that provided for in the last clause of section 21 of the Specific Relief Act, which was inapplicable to the case, as the reference relied on by the defendant was made during the pendency, and not before the institution, of the suit. The suit could therefore proceed notwithstanding the reference to arbitration which had been made out of Court. The question before us was, no doubt, not discussed or decided in that case, but certain observations made by the learned Judges in the course of their judgment have an important bearing on the point. They say: "Now it must be taken as clear law that unless there is something in the Code of Civil Procedure or in some other Act to oust the jurisdiction of the Court, every Civil Court must have power to proceed to a final adjudication of a suit of a Civil nature which has once been properly instituted before it..... It is certainly not competent to the parties themselves, by some subsequent act of their own, to deprive the ordinary Courts of the jurisdiction which they otherwise possess." The same principle was laid down in *Khatija v. Ismail* (1) and in *Kubra Jan v. Ram Bali* (2).

In No. 50 P. R. 1891 (*Fakir v. Jaimal*) (3), in which the Court of first instance had dismissed the plaintiffs' suit on the ground that during its pendency an agreement to refer to arbitration had been made between the parties and that the suit could not go on as the plaintiffs' sole remedy was under section 523, Civil Procedure Code, it was held by this Court following No. 130 P. R. 1882 (*Budha v. Haku*) (4), that there was no bar to the suit proceeding, inasmuch as the last clause of section 21, Specific Relief Act, was inapplicable to a case in which a reference to arbitration was made out of Court during the pendency, and not before the institution, of a suit. The decisions of the Allahabad High Court in *Salig Ram v. Jhanna Kuar* (5) and *Sheoambar v. Deodat* (6) were dissented from.

The earlier Allahabad decision just cited is directly opposed to our view. That was a case in which the parties to a suit

(1) (1889) I. L. R. 12 Mad. 380 (386).

(2) (1908) 5 All. L. J. R. 647 (653) see also I. L. R. 30 All. 560 (F. B.).

(3) 50 P. R. 1891.

(4) 130 P. R. 1882.

(5) (1882) I. L. R. 4 All. 546.

(6) (1880) I. L. R. 9 All. 168.

applied for an adjournment on the ground that they had agreed to refer the matters in difference between them in such suit to arbitration. The Court accordingly adjourned the suit, and the matters in difference therein were referred to arbitration by the parties, and an award was made therein disallowing the plaintiffs' claim. It was held by the Allahabad High Court that under these circumstances the further hearing of the suit was barred by the last clause of section 21 of the Specific Relief Act. As has been mentioned above, this ruling was dissented from by this Court, in No. 50 P. R. 1891 (*Fakir v. Jaimal*) (1); but it has been followed by the Allahabad High Court in two latter decisions namely, *Sheoambar v. Deodat* (2) and *Sheo Dat v. Sheoshankar Singh* (3). In the last mentioned case it was held that where parties to a suit have agreed to refer the matters in dispute between them in such suit to arbitration, such an agreement ousts the jurisdiction of the Court to proceed with the suit, whether it is filed in Court under the provisions of section 523 of the Code of Civil Procedure or not. After citing the previous decisions of their own Court on the point, the learned Judges go on to observe at page 55: "It appears to us that, having regard to the sections of the Code of Civil Procedure, dealing with the subject of arbitration, section 523 was intended to have effect in a case such as the present. Section 506 and the following sections, up to section 522, deal with cases in which the parties to a suit desire to leave the matters in difference between them to arbitration and apply to the Court for an order of reference. Those are not cases like the present. In such cases there are provisions for all the necessary steps following upon an order of reference by the Court. But section 523 refers to cases in which persons, whether they be litigants or not, themselves agree, independently of the Court, to refer the matter in difference between them to arbitration, and ask the Court to have the agreement filed; then section 525 enables parties, who have agreed to refer their differences to arbitration and have obtained an award, to have that award filed in Court. The course which the appellants in the present case ought to have taken is that provided by section 523. They omitted to follow that course, and, despite the fact that they had agreed to refer the dispute to arbitration, proceeded to carry on the litigation. We think it would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of justice."

(1) 50 P. R. 1891.

(2) (1886) I. L. R. 9 All. 168.

(3) (1904) I. L. R. 27 All. 53.

In *Harivalabdas Kalliandas v. Utamchand Manekchand* (1), it was held that under sections 523 and 525 of the Civil Procedure Code (Act X of 1877), parties to a suit as well as persons not engaged in litigation may agree to refer matters in dispute between them to private arbitration without the intervention of the Court, and may apply to have the agreement filed; and that the mere fact that a suit is pending with respect to the matters in dispute, is not of itself a sufficient reason to induce the Court to refuse to file the agreement. At p. 3 of the report the learned Judges say: "It was next contended that section 523 is not applicable to matters in difference *in a suit*; and that the earlier sections in the chapter, which provide for the case of *parties to a suit* desiring to refer matters in difference to arbitration, are alone applicable to such a case. We think, however, that the very general language of sections 523 and 525 forbids this conclusion. Those sections contemplate arbitration without the intervention of the Court by 'any persons' and with respect to 'any matter,' and contain no express exception as to parties to a suit or to matters in litigation in a suit actually pending. Moreover, it is to be remarked that there is an absence of any expression in section 506 shewing an intention to forbid arbitration by parties to a suit without the intervention of the Court. Undoubtedly, the procedure in such cases, as provided by sections 523 and 525, *viz.*, a separate suit, is not the best adopted to a case where the matters are already before the Court; and will necessitate an application for stay of proceedings in that suit. It is, therefore, probable that the particular case in question was not present at the time to the minds of the framers of those sections. But, having regard to the general scope of the provisions in this chapter, we do not think that that consideration is sufficient to outweigh the inference to be drawn from the very general language of these sections. Whether the existence of a suit, in which the matters in difference are in litigation, may under special circumstances afford sufficient causes, as contemplated by sections 523 and 525, for not filing the agreement to arbitrate, it is not necessary to decide."

With the greatest possible respect to the learned Judges of the Bombay High Court and of the Allahabad High Court, we think that the views expressed by them in their judgments in the abovementioned cases are not tenable in the face of the observations of their Lordships of the Privy Council in the well

known case of *Ghulam Jilani v. Muhammad Hassan* (No. 25 P. R. 1902) (1). In their judgment in that case, Their Lordships analyse the provisions of Chapter XXXVII of the Civil Procedure Code of 1882 relating to arbitration and divide them into three groups. Their Lordships say :—

“ The Chapter in the Code of Civil Procedure or *Reference to Arbitration* (Chapter XXXVII) deals with arbitration under three heads :—

- “ 1. Where the parties to a litigation desire to refer
“ to arbitration any matter in difference between
“ them in the suit. In that case all proceedings
“ from first to last are under the supervision of
“ the Court.
- “ 2. Where parties without having recourse to litigation
“ agree to refer their differences to arbitration,
“ and it is desired that the agreement of reference
“ should have the sanction of the Court. In that
“ case all further proceedings are under the
“ supervision of the Court.”
- “ 3. Where the agreement of reference is made, and the
“ arbitration itself takes place without the
“ intervention of the Court, and the assistance of
“ the Court is only sought in order to give effect
“ to the award.”

“ In cases falling under head No. 1, the agreement to refer and the application to the Court founded upon it must have the concurrence of all parties concerned, and the actual reference is the order of the Court. So that no question can arise as to the regularity of the proceedings up to that point. In cases falling under heads Nos. 2 and 3 proceedings described as a suit and registered as such must be taken in order to bring the matter—the agreement to refer, or the award, as the case may be—under the cognizance of the Court.”

It would appear from these observations of Their Lordships of the Privy Council that, according to the Code of Civil Procedure, proceedings under heads Nos. 2 and 3, as set out above, are intended to be taken only in cases where the parties *without having recourse to litigation* agree to refer their dispute to arbitration, and it is desired either—

- (1) that the agreement of reference should have the sanction of the Court, for which provision was made by section 523 of the old Code, or

- (2) that the award which has been given by the arbitrators upon a private agreement of reference being made to them should be given effect to by a Court of Justice, to which end an application under section 525 of the old Code had to be made to the Court having jurisdiction over the matter to which the award relates

If the parties have instituted a suit in Court and the Court is seized of the subject-matter of dispute between them, the only way in which, in the event of their desiring to settle the dispute by arbitration, they can interfere with the trial of the suit by that Court according to the ordinary rules of procedure, is to apply to it for an order of reference as provided by section 506 of the old Code and by section 1 of the second schedule of the new Code. They cannot ignore the existence of the Court or oust its jurisdiction by adopting the expedient of either simply agreeing to refer the matter to arbitration without the sanction of the Court or allowing the arbitrators to make an award upon such reference behind the back, as it were, of the Court. In other words, section 523 and section 525 of the old Code of Civil Procedure, which correspond with section 17 and section 20, respectively, of the second schedule to the new Code, apply only to cases where there is no pending litigation; and section 506 of the old Code (corresponding with section 1 of the second schedule to the new Code) was the only section which applied to arbitration during the pendency of a litigation. Maclean, C. J., expressed the same opinion in *Tincowry Dey v. Fakir Chand Dey* (1). At page 228 of the report the learned Chief Justice says:—".....Section 523 (Civil Procedure Code of 1882) does not apply to the case of an agreement to refer, where there is a pending litigation. Section 506 appears to apply to the case where parties have agreed to refer in a pending suit, and section 523 to the case where there is no pending litigation. At least this is the way in which I read the observations of Their Lordships of the Judicial Committee in the case of *Ghulam Khan v. Muhammad Hassan* (2), to which I have already referred, it is true that a contrary view was expressed in the case of *Harivalabdas Kalliasdas v. Utamchand Manekchand* (3), but I doubt, if this decision can stand, having regard to the Privy Council case to which I have referred."

Section 523 and section 525 of the Civil Procedure Code of 1882 lay down, as also do the corresponding sections of the second schedule to the new Code, that the application referred

(1) (1902) I. L. R. 30 Cal. 218.

(2) 25 P. R. 1902 (P. C.).

(3) (1879) I. L. R. 4 Bom. 1.

to therein shall be in writing and shall be numbered and registered as a *suit* between the applicant as plaintiff and the other parties as defendants, and that the Court shall direct notices of the application to be given to the parties other than the applicant, requiring them to shew cause, within a time specified, why the agreement to refer to arbitration or the award, as the case may be, should not be filed. These provisions appear to us to indicate that the legislature intended them to apply to cases where there is no suit relating to the same matter already pending between the parties who are affected by the agreement to refer or by the award mentioned in section 523 and section 525 respectively, for otherwise two suits between the same parties about the same subject-matter would proceed side by side in the same Court with conceivably conflicting results. It is difficult to see how, in view of the provisions of section 12 of the Code of 1882 (which corresponds with section 10 of the present Code), the *second suit* between the parties initiated by an application filed under section 523 or under section 525 of the old Code (or under the corresponding sections of the second schedule to the new Code) could be tried, seeing that the previously instituted suit between the same parties and relating to the same subject-matter had not *ex hypothesi* been disposed of before the institution of the second suit. The provisions of section 20 of the old Code relating to stay of proceedings in a suit did not apply to a case of this kind; and as, in our opinion, the previously instituted suit was (as held by this Court in 130 P. R. 1882 (*Budha v. Haku*) (1) and 50 P. R. 1891 (*Fakir v. Jaimal*) (2)), not barred by the last clause of section 21 of the Specific Relief Act, by reason only of an agreement being made between the parties, during the pendency of the suit, for reference to arbitration, the view taken by the Bombay and Allahabad High Courts, as noticed above, would lead to anomalous consequences. As was remarked by the learned Judges of Allahabad High Court in *Sheo Dat v. Sheoshankar Singh* (3): "It would be most inconvenient if two simultaneous proceedings in respect of disputes were allowed, namely, arbitration proceedings and proceedings before a Court of justice." The most reasonable view, and, in our opinion, the easiest way out of the difficulty, would be to hold that proceedings before the Court were the only valid proceedings, and that the Court being properly seized of the matters in difference between the parties could not take cognizance of arbitration proceedings to which the sanction of

(1) 130 P. R. 1882.

(2) 50 P. R. 1891.

(3) (1904) I. L. R. 27 All. 53.

the Court had not been accorded in the manner laid down in section 506 of the old Civil Procedure Code or section 1 of the second schedule to the new Code.

For the foregoing reasons, we hold that during the pendency of a suit between them, the parties in this case were precluded from entering into an agreement to refer to arbitration the subject-matter of the suit without the intervention of the Court, and the award made by the arbitrators in pursuance of that agreement could not be taken cognizance of by the Court so as to be made the basis of a proceeding under section 525 of the Civil Procedure Code of 1882. It follows that the Divisional Judge was in error in accepting the award as a valid adjudication upon the subject-matter of the suit and in passing a decree in accordance with it. We therefore accept this appeal, set aside the decree of the lower Appellate Court, and remand the case, under order XLI, rule 23, Civil Procedure Code, to the lower Appellate Court for a decision on the merits. The stamp on appeal shall be refunded and other costs shall be costs in the cause.

Case remanded.

No. 116.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

RALLA—(DEFENDANT)—APPELLANT

Versus

MUSSAMMAT MANGLAN—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 102 of 1912.

Guardian and Wards Act, VIII of 1890, section 39 (h)—removal of guardian who resided outside the jurisdiction at time of appointment—Code of Civil Procedure, section 114—review.

Held, that section 39 (h) of the Guardian and Wards Act does not apply to the case of a guardian, who was residing outside the jurisdiction of the Court at the time of appointment.

Held also, that section 114 of the Code of Procedure, providing power to review, does not apply to the Guardian and Wards Act.

143 P. R. 1906 (*Farid v. Mitho*) (1), referred to.

First appeal from the order of C. F. Usborne, Esquire, District Judge, Ambalu, dated 28th October 1911.

Moti Lal for appellant.

Roshan Lal for respondent.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The District Judge's order, 31st May 1912. removing the appellant from the guardianship of the minors, purports to be under section 39 (h) of the Guardians and Wards Act, VIII of 1890, and the reason recorded is that the appellant "lives outside the jurisdiction of the Court" and is for that reason less eligible and "removeable." This is obviously a misinterpretation of the sub-section. Section 39 (h) provides for removal when the guardian ceases to reside within the Court's jurisdiction, but the appellant was admittedly residing outside the jurisdiction when appointed.

The District Judge's action was in effect a review of his judgment appointing, and of Mr. Rahim Bux's order refusing to remove, the appellant, and 143 P. R. 1906 (*Farid v. Mitho*) (1) is authority for holding that section 114 of the Code of Civil Procedure, providing power to review, does not apply to this Act, and the inapplicable section 39 (h) was apparently cited in default of an applicable provision of the Act.

I allow the appeal, and set aside the order appointing Mussammat Manglan guardian and the order removing the appellant from guardianship, with costs.

Appeal accepted.

No. 117.

Before Hon. Mr. Justice Kensington and Hon. Mr. Justice Chevis.

HARIA AND OTHERS—(DEFENDANTS)—APPELLANTS

Versus

MUSSAMMAT BASANT KAUR AND OTHERS—
(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1181 of 1909.

Act XIII of 1885—claim for compensation against persons who had been convicted in a Criminal Court as members of an unlawful assembly, one of whom caused the death—their Civil liability—proof required in Civil Court—evidence.

Held, that a claim for compensation under Act XIII of 1858 lies only against the person who actually caused the death or at least took part directly in causing it, and not against persons who may have been found criminally responsible as members of the unlawful assembly.

Held also, that plaintiff must prove that defendant caused the death. It is not sufficient to refer to the Criminal case in which defendant was convicted, though the proceedings in that Court may be examined to test the evidence offered in the Civil Court.

56 P. R. 1905 (*Mahi v. Ambo*) (2), differentiated.

(1) 143 P. R. 1906.

(2) 56 P. R. 1905.

Further appeal from the decree of H. Harcourt, Esquire, Additional Divisional Judge, Shahpur Division, dated 20th August 1909.

Nand Lal, for appellants.

Rambhaji Datta, for respondents.

The judgment of the Court was delivered by—

8th June 1912.

CHEVIS, J.—This judgment will also cover the cross-appeal No. 1253 of 1909.

On 15th May 1907 there was a drunken riot in *Chak* No. 104 Ct. B. in which Pala Singh was killed and Sawan Singh had both arms broken. In the trial which ensued six persons were tried and convicted as follows :—

Channan Singh, transportation for life, section 304, part 1, Indian Penal Code.

Khushala, 5 years' rigorous imprisonment, section $\frac{147}{325}$.

Sawan Singh, 3 years' rigorous imprisonment, section $\frac{147}{326}$.

Harria, }
Bhana, } each 2 years' rigorous imprisonment, section $\frac{147}{327}$.
Bagga, }

Five of the six convicts appealed to the Chief Court, but without success.

The present suit is by the widow and minor sons of Pala Singh, claiming Rs. 2,000 as damages from Channan, Harria and Bagga.

Such a claim lies under Act XIII of 1858, but we are unable to see that the claim lies against persons other than the person or persons who actually caused the death of Pala Singh. No doubt there are cases in which all members of an unlawful assembly are criminally liable for acts committed by any member of the assembly (see section 149, Indian Penal Code), but in order to establish Civil liability, we think, it must be clearly established against any person either that he actually committed the wrongful act himself or at the least that he actively aided and abetted the deed and so took part directly in causing it. We do not think it is sufficient to say that he knew that the act was likely to be committed or that the act was committed in the prosecution of a common object. This matter, however, has not been considered by the lower Courts, which have in a summary manner regarded it as proved that the death of Pala Singh was caused by all three of the defendants. The first Court awarded Rs. 2,000 as damages. The learned Divisional Judge on appeal reduced the damages to Rs. 1,000. Both sides appeal to this Court, the defendant

asking for dismissal of the claim, the plaintiffs asking for the damages to be raised to Rs. 2,000.

The first question is, which of the defendants caused the death of Pala Singh. This is a matter which admittedly has to be proved in the Civil suit; it is not sufficient to refer to the Criminal case, though we hold that the proceedings in the Criminal case may be examined to test the evidence offered in the Civil suit.

In the Civil suit the only evidence as to who caused the death is the statements of the witnesses Thakur Singh and Pala Singh, sons of Ghaniya. The other two witnesses produced by the plaintiffs own that they were not present at the affray.

Neither Thakur Singh nor Pala Singh, sons of Ghaniya, give any detailed account of the fight. They merely say that they saw all the three defendants killing Pala Singh. It is a pity that they were not examined more carefully. Both the lower Courts have really based their opinion on the findings in the Criminal case. The first Court, after noting that the finding of the Sessions Judge was that Channan dealt the fatal blow, says, "the witnesses whose evidence led to this conclusion have again been examined, and I feel no difficulty in coming to the same conclusion." We do not understand how, on the evidence as given in the Civil case, any Court could possibly come to a finding that it was Channan Singh any more than either of the other two defendants who struck the fatal blow. The first Court then goes on to hold that the other two defendants also took part in the riot, and assaulted the deceased. It certainly was not found in the Criminal case that all three of the present defendants had assaulted the deceased. On the contrary the finding was that Channan had struck the fatal blow, that Bagga had merely hit Pala Singh on the back with a stick and that Haria had not hit him at all. These findings are quite at variance with the evidence now given which ascribes the death to the three defendants jointly.

The learned Divisional Judge while recognising that the judgment of the Chief Court in the Criminal case is not conclusive for purposes of the present suit, seems to think that that judgment renders it unnecessary to weigh the evidence in the present suit with any care, and he comes to a loose general finding that all the defendants "took part in the riot in the course of which Pala Singh was killed." But such a finding is not sufficient, as was pointed out in the beginning of this judgment, to charge the defendants with Civil liability. It has

to be shewn, not merely who took part in the riot but who caused the death.

On the meagre evidence before us we cannot find it proved who caused the death. Two witnesses simply say in a general manner that all the defendants killed Pala Singh, and this evidence we do not believe in the face of the findings come to after a careful trial of the Criminal case in the Sessions Court. We cannot, therefore, uphold the decision of the lower Courts on the evidence now before us.

* * * * *

[The remainder of the judgment is immaterial for purposes of report.]

8th June 1912.

KENSINGTON, J.—I agree throughout with my learned colleague. I should like to add that this case is differentiated from that discussed in 56 P. R. 1905 (*Mahi v. Ambo*) (1) by the fact that there is here neither admission nor proof that any of the defendants are directly liable for damages in consequence of Pala Singh's death. It is difficult to understand how the lower Court came to the conclusion that the defendant Haria in particular was civilly liable for the very minor part taken by him in the fight, seeing that his father Khushala who was also convicted and more heavily sentenced has not even been made a defendant to the suit. Even as regards the main offender Channan Singh, the fact that both sides were more or less drunk goes far to release him from Civil liability, even if more adequate evidence had now been forthcoming against him.

Appeal accepted.

No. 118.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

GANGA RAM—(DECREE-HOLDER)—PETITIONER

Versus

DINA NATH—(JUDGMENT-DEBTOR)—RESPONDENT.

Civil Revision No. 2475 of 1911.

Civil Procedure Code, 1908, order 21, rule 17 (2)—application for execution by agent not properly authorised, who subsequently files a power-of-attorney.

Held, that when on an application for execution, presented by agent, it was objected that the agent was not duly authorised and the former thereupon filed a power-of-attorney, the Court should not dismiss the application but treat it as having been filed on the date on which the power-of-attorney was

filed, on the principle contained in order 21, rule 17 (2), Code of Civil Procedure.

105 P. R. 1882 (*Lakmi Das v. Gobind Ram*) (1), 23 P. R. 1883 (*Mrs. Baness v. Col. Turton*) (2), *Fuzloor Ruhman v. Altaf Hossein* (3) and *Lachman Bibi v. Patni Ram* (4), referred to.

*Petition for revision of the decree of J. P. Thompson, Esquire,
Divisional Judge, Delhi Division, dated 1st June 1911.*

Beni Parshad and Dhanraj Shah, for petitioner.

Ganpat Rai and Beechey, for respondent.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—An application for execution of the decree, in respect of the execution of which this appeal has been filed, was made on the 11th November 1907, by “Amar Chand, *karinda*.” It was struck off in default of prosecution, neither the decree-holder nor the judgment-debtor putting in an appearance. The present application was made on the 26th of August 1910 by Amar Chand, *gomashita* and *kar karinda*. On the 19th October 1910 the judgment-debtor objected that Amar Chand was not empowered to apply for execution. On the 20th October 1910, a power-of-attorney by the decree-holder empowering Amar Chand to apply for execution was filed. On the 20th of February 1911 the application for execution was dismissed, on the ground that it was not duly presented, Amar Chand not having been empowered to present it.

8th June 1912.

Apart from the question whether Amar Chand, who was the decree-holder's agent at Delhi and was empowered to transact all business connected with the decree-holder's business at Delhi, was a recognised agent of the decree-holder within the terms of order III, rule 2 (b) of the Code of Civil Procedure, for the purpose of execution of a decree obtained at Agra by the decree-holder in respect of the business carried on by him there, and also from the question whether Amar Chand was a person who could be proved to the satisfaction of the Court to be acquainted with the facts of the case within the terms of order XXI, rule 11 (2) of the Code, the executing Court should, in my opinion, have accepted the power-of-attorney filed on the 20th October 1910 and treated the application for execution as having been filed on that date, on the principle contained in order XXI, rule 17 (2) of the Code. This would have kept the application within limitation.

(1) 105 P. R. 1882.

(2) 23 P. R. 1883.

(3) (1884) I. L. R. 10 Cal. 541.

(4) (1877) I. L. R. 1 All. 510.

The result of the procedure adopted was that on the 28th of February 1911, when the application was finally rejected, a fresh application would have been barred by limitation.

105 P. R. 1882 (*Lakmi Das v. Gobind Ram*) (1), 23 P. R. 1883 (*Mrs. Baness v. Col. Turton*) (2), *Fuzloor Ruhman v. Altaf Hossein* (3) and *Lachman Bibi v. Patni Ram* (4), support the view that the application for execution should be treated "as having been duly presented."

I decree the appeal and set aside the decrees of the Courts below, and return the record to the executing Court which will proceed with the execution.

Costs of this Court will be costs in the cause.

Appeal accepted.

No. 119.

Before Hon. Mr. Justice Scott-Smith.

CHHUBU MIAN—(DEFENDANT)—APPELLANT

Versus

HARCHARN DAS—(PLAINTIFF)—RESPONDENT.

Civil Appeal No. 1220 of 1911.

Civil Procedure Code, 1908, section 104 (2)—further appeal from order of Appellate Court in an appeal from an order allowed by the rules of the Code—Revision.

The plaint in this case was presented in the Court of the District Judge of Ludhiana, who holding that the Ludhiana Court had no jurisdiction returned it for presentation to the proper Court under order 7, rule 10, Code of Civil Procedure. Appeal was made to the Divisional Court which held that the Ludhiana Court had jurisdiction and remanded the case under order 41, rule 23, for trial on the merits.

Held, that under section 101 (2), Code of Civil Procedure, no appeal is competent from the order of the Divisional Court, it being an order in an appeal allowed by rule 1 (a), order 43, of the Code.

Naubat Singh v. Baldeo Singh (5) and 147 P. L. R. 1911 (*Mannu Lal v. Harcharan Das*) (6), followed.

50 P. R. 1911 (*Faiz Ahmad v. Badar Din*) (7), referred to..

Held also, that the order is not open to revision.

1 P. R. 1911 (*Sardar Arur Singh v. Bua Ditta*) (8), referred to.

(1) 105 P. R. 1882.

(2) 23 P. R. 1883.

(3) (1884) I. L. R. 10 Cal. 511.

(4) (1877) I. L. R. 1 All. 510.

(5) (1911) I. L. R. 33 All. 479.

(6) 147 P. L. R. 1911.

(7) 50 P. R. 1911.

(8) 4 P. R. 1911.

Further appeal from the order of H. A. Rose, Esquire, Divisional Judge, Ludhiana, dated 3rd August 1911.

Harris and Fazal Ilahi for appellant.

Obedulla and Ghulam Rasul for respondent.

The judgment of the learned Judge was as follows :—

SCOTT-SMITH, J.—The suit out of which this appeal has arisen, was instituted in the Court of the District Judge of Ludhiana. 13th June 1912.

That officer holding the Ludhiana Court had no jurisdiction, returned the plaint for presentation to the proper Court under rule 10 of order VII of the Civil Procedure Code.

The plaintiff appealed to the Divisional Judge under order XLIII, rule 1 (a), of the Code. That officer held that the Ludhiana Court had jurisdiction and accepting the appeal remanded the case under order XLI, rule 23, Civil Procedure Code, for trial on the merits.

Defendant has lodged a further appeal to this Court, and a preliminary objection has been raised before me that no appeal lies.

The question has been argued before me from two points of view. If it be treated as an appeal from an order of remand under order XLIII (1) (u), then it is argued by respondent's counsel that as the value of the suit is less than Rs. 2,500, it cannot be said whether an appeal would or would not lie from the final decree of the Divisional Judge under section 40 (1) (a) of the Punjab Courts Act. Under such circumstances, 50 P. R. 1911 (*Faiz Ahmad v. Badar Din*) (1) is authority for the proposition that no further appeal lies.

Appellant's counsel admits the authority of this ruling, but contends that under the new law, Punjab Act I of 1912, a second appeal would lie from the decree of the Divisional Judge and therefore an appeal lies from the order of remand.

Without deciding whether appellant can invoke the aid of a law which was passed after he filed his appeal, I have no hesitation in holding that no appeal lies to this Court. The order of the Divisional Judge was an order passed in appeal under section 104 (2) of the Civil Procedure Code. The order

appealed against is an order passed in appeal under that section because clause (1) of the section allows an appeal from an order made under rules from which an appeal is expressly allowed by rules and order XLIII, rule 1 (a), allows an appeal from an order made under rule 10 of order VII. —

As the lower Appellate Court made an order in an appeal from an order, as allowed by order XLIII, no further appeal lies from the order of the Appellate Court, *Naubat Singh v. Baldeo Singh* (1).

The same view was taken in 147 P. L. R. 1911 (*Mannu Lal v. Harcharan Das*) (2).

If no appeal lies, counsel asks me to treat it as a revision, but 4 P. R. 1911 (*Sardar Arur Singh v. Bua Ditta*) (3), which is quite on all fours with the present case, is an authority in support of the view that the order of the Divisional Judge is not open to revision.

The appeal is therefore rejected with costs to respondent.

Appeal dismissed.

No. 120.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

MOHAR SINGH AND OTHERS—(DEFENDANTS)—
PETITIONERS

Versus

TAJ MOHAMED AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Revision No. 710 of 1908.

Jurisdiction—Civil or Revenue Court—suit for a share in dharat collected by defendants—small cause.

Held, that a suit for plaintiffs' share in dharat collected by the defendants is cognisable by a Civil Court.

28 P. R. 1894 (*Buta v. Fauja Singh*) (4), followed.

Held also, that such a suit is a small cause.

81 P. R. 1889 (*Harnam v. Ganda*) (5) and 204 P. R. 1889 (*Hayat Shah v. Javaya*) (6), referred to.

29 P. R. 1889 (*Ram Singh v. Sikandar*) (7), distinguished.

(1) (1911) I. L. R. 33 All. 479.

(2) 147 P. L. R. 1911.

(3) 4 P. R. 1911.

(4) 28 P. R. 1894.

(5) 81 P. R. 1889.

(6) 204 P. R. 1889.

(7) 29 P. R. 1889.

Petition under section 70 (a); (b) of XVIII of 1884, for revision of the decree of H. A. Rose, Esquire, Divisional Judge, Multan Division, dated 20th November 1907.

Muhammad Shafi for petitioners.

Shadi Lal for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The first question for consideration is the nature of this suit. 29th June 1912.

It was against certain persons, in whose hands were collections in respect of *dharat*, for the share alleged by the plaintiff to be his in his capacity as *lambardar*.

28 P. R. 1894 (*Buta v. Fauja Singh*) (1), is direct authority for the proposition that the suit is cognisable by a Civil Court, being for money received by defendants to the use of the plaintiff. The question whether the suit was a small cause, was not dealt with in the 1894 case, but 81 P. R. 1889 (*Harnam v. Gandu*) (2), cited therein, is authority for holding that the present suit is a small cause.

The value is under Rs. 1,000. Section 70 (1) (b) of the Courts Act is consequently inapplicable, and the questions of law argued are therefore beside the point.

204 P. R. 1889 (*Hayat Shah v. Jawaya*) (3), does not help the petitioners on the question of the nature of the suit, nor does 29 P. R. of the same year (*Ram Singh v. Sikandar*) (4), the suit therein dealt with being by *lambardars* against the village community, not against a stake-holder or a person who had wrongly received the plaintiffs' share.

I have ascertained that notice was, in fact, issued under section 70 (1) (a), not under section 70 (1) (b), but I see no reason for interference. The lower Appellate Court appears to have considered all the material before it and to have based its decision on that material, and I can find no irregularity.

The application is dismissed with costs.

Revision dismissed.

(1) 28 P. R. 1894.
(2) 81 P. R. 1889.

(3) 204 P. R. 1889.
(4) 29 P. R. 1889.

No. 121.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Beadon.

ABDUL KARIM AND OTHERS—(DEFENDANTS)—

APPELLANTS

Versus

HAJI ALLAH BAKHSH AND OTHERS—

(PLAINTIFFS)—RESPONDENTS.

Civil Appeal No. 1043 of 1910.

Landlord and tenant—land let for building sites in Kishenganj, Delhi—permanent tenures at fixed rent—whether landlord can claim ejectment of tenant or enhancement of rent, or object to rebuilding.

Plaintiffs as ground landlords of a part of the suburbs of Delhi known as Kishenganj sued defendants in three separate suits for ejectment, and, in case ejectment was not granted, plaintiffs prayed in two of the suits for enhancement of rent and in the third suit for an injunction restraining the defendants from rebuilding.

It appeared that the land was let in or about the year 1859 for building sites at a ground rent of 8 annas per 100 square yards, that the lessees built houses upon the land and that they or their successors in title had been in occupation ever since at the rent originally fixed.

Held, that the tenancies were of a permanent character at a fixed rate of rent and that the claim for ejectment or enhancement must therefore be disallowed.

Held also, that the plaintiffs had no right to prevent the defendants from reconstructing their houses.

Caspersz v. Kader Nath Sarbadhikari (1), referred to.

Prosunno Coomaree Debea v. Sheikh Rutton Bepary (2), *The Secretary of State for India v. Luchmeswar Singh* (3) and *Beni Ram v. Kundan Lal* (4), distinguished.

Further appeal from the decree of A. E. Martineau, Esquire, Divisional Judge, Delhi, dated 27th June 1910.

Pestonji Dadabhai and Prem Lal for appellants.

Muhammad Shafi and Shadi Lal for respondents.

The judgment of the Court was delivered by—

30th July 1912.

BEADON, J.—These connected suits (Nos. 48, 49 and 51 of 1908), which were tried together by the Subordinate Judge at Delhi, were the subject of three appeals to the Divisional Court and are now the subject of five further appeals.

This appeal No. 1043 and appeal No. 1049 of 1910 are cross-appeals relating to suit No. 49—appeals Nos. 1044 and

(1) (1901) *I. L. R.* 28 Cal. 738.

(2) (1878) *I. L. R.* 3 Cal. 696.

(3) (1888) *I. L. R.* 10 Cal. 223.

(4) (1899) *I. L. R.* 21 All. 496 (P. C.).

1048 of 1910 are cross-appeals relating to suit No. 57. And appeal No. 1047 relates to suit No. 48. These 5 appeals can conveniently be considered together.

The plaintiffs, who are the same in all three suits, are the ground landlords of a part of the suburbs of Delhi known as Kishenganj; in which the houses of each set of defendants are situate.

The suits are for ejectment of the defendants from the land occupied by their houses and for recovery of arrears of rent. In case ejectment is not granted, plaintiffs in suits 49 and 51 ask for enhancement of rent and in suit 48 they ask for an injunction restraining defendants from rebuilding.

The first Court held that the defendants in all three cases are permanent tenants—that notices were not properly served on them—and that plaintiffs are not entitled either to eject them or enhance the rent. It accordingly decreed only arrears of rent at the old rate.

The lower Appellate Court has maintained the first Court's decree in suit No. 48—but in the other two suits it has allowed enhancement of rent to double the old rate to take effect from the dates on which the suits were instituted.

The first and chief point for decision is whether the defendants are permanent tenants or tenants-at-will.

It appears that in or about 1859 after the mutiny certain Punjabis had to vacate their *katra* which was situate on the site of the present railway station. At that time the land which is now the site of Kishenganj was waste land and the then owner, Ladli Das, seeing an opportunity of turning the land to profit, let the land to the Punjabis for building sites at a ground rent of Re. 0-8-0 per 100 square yards. The tenants duly built upon the land and they and their successors in interest have been in occupation ever since. It is probable that the original houses were *kachcha* but without objection or protest on the part of the ground landlord, the houses (or at any rate most of them) have been converted into *pukka* houses of considerable value.

The approximate date of the commencement of the tenancies and the rate of rent then fixed are undisputed facts but the other conditions are disputed and must be determined chiefly from the conduct of the parties.

According to the defendants' witness, Ghulam Jalani, one Mamur Bakhsh, now dead, acted on behalf of the tenants and obtained a written agreement from Ladli Das. This agreement

is not forthcoming and it is urged that this is good ground for presuming that the agreement did not grant permanent tenure.

If however, the agreement was reduced to writing, it seems hardly probable that the ground landlord would not have himself taken a document from the tenants, and though Ghulam Jalani may have thought that a document was executed, he has no personal knowledge of the existence of such a document.

In 1883 a tenant named Kalu sued to have it declared that he was neither liable to ejection nor to have his rent enhanced and that, if ejected, he was entitled to receive the value of his building.

In this suit, an alleged copy of an agreement was relied on, but though admitted by the first Court, it was held by the Appellate Court not to have been proved. In second appeal to this Court the suit was dismissed on the ground that it did not lie, and it was remarked that "all enquiry into the merits of the case is of course mere surplusage."

Thus in the suit of 1883 the agreement was not proved and as no evidence in proof of this document has been produced in the present cases, the document on the record of the suit of 1883 is useless.

In 27 suits decided by Mr. O'Brien, Munsif, 1st Class, in 1897, for ejection of tenants, two related to tenants holding under separate leases—but the remaining 25 suits failed on the ground that the tenants were permanent tenants not liable to ejection. It is true that these suits related to a quarter known as Shishmahal, but Ladli Das, who owned the Kishenganj land and settled tenants on it, was the man who also owned the Shishmahal land and settled tenants thereon—and it may fairly be presumed that in both cases the land was granted on much the same terms.

Receipts for rent have been produced in which the rent is described as "*dawami*" or permanent. It is alleged that 4 of these have been tampered with, but, even assuming that there may be ground for suspicion in regard to these, the other receipts relating to other houses do not appear to be open to suspicion and the existence of a permanent rate of rent is an indication of permanent tenure.

In 1883 Allah Bakhsh, plaintiff No. 1, who was then an *amladar* sold his house to Muhammad Hussain (Ex. D. 4) and it is a significant fact that the word "*dawami*" appears in this deed.

The rent of the sites in dispute has never been enhanced. There have been transfers by mortgage, gift and sale. In suit 51 at least, Mussammat Latifan obtained the house by inheritance—and throughout the tenant's long possession since 1859 the ground landlord has in no way interfered with the erection of *pukka* buildings. In *Prosunno Coomaree Debea v. Sheikh Rutton Bepary* (1) it was held that a holding at will from year to year, or for a term of years would not be converted into a permanent tenure merely because the tenant, without any arrangement with his landlord, builds a dwelling house upon the land.

In *The Secretary of State for India v. Luckmeswar Singh* (2), the original purpose of the tenancy was for a stud, and the stud having been given up, the land was used for ordinary agricultural purposes. It was held that long possession at a uniform rent was insufficient to establish a permanent tenure.

In *Beni Ram v. Kundan Lal* (3), a piece of land had been let for a specified period at a specified rent for the construction thereon of a saltpetre factory. It was held that the lessor could evict the tenant after the term of the lease had expired, notwithstanding that the tenant had erected permanent structures without interference on the part of the landlord.

In Civil Appeal No. 1125 of 1905 (Ex. P. 17 C.) the rent had been enhanced from time to time and the buildings had been erected only a few years before suit and it was held that the tenancy was not permanent.

The above authorities are relied on by plaintiffs' counsel, but they are distinguishable from the present cases. The defendants do not contend that a holding-at-will has been converted into a permanent tenancy, merely by the erection of buildings—or merely by long possession at a uniform rent. The contention is that the land was let originally on a permanent tenure for building purposes—and long possession at a uniform rent, erection of expensive buildings without interference, and transfers by sale, gift and mortgage and, by succession, are put forward as indications that from the first the tenure was permanent. It is, we think, beyond doubt that in making his vacant land into the settlement of Kishenganj, Ladli Das intended that the settlers should build their own houses and settle permanently.

(1) (1878) *I. L. R.* 3 Cal. 696.(2) (1888) *I. L. R.* 16 Cal. 223.(3) (1899) *I. L. R.* 21 All. 496 (P. C.).

The present cases if not on all fours with *Caspersz v. Kader Nath Sarbadhikari* (1) are very similar to it, and we agree with the lower Courts in finding that the defendants are permanent tenants.

The next point for decision has reference to the claim for enhancement of rent, and in this connection we have been referred to section 22 of the Punjab Tenancy Act.

The case of occupancy tenants of agricultural land does not appear to be analogous to that of owners of houses in a town who are permanent tenants of the sites of their houses. Agricultural land is subject to the payment of land revenue of which the amount is altered from time to time, and the rent payable by the occupancy tenant is regulated by the amount of the land revenue.

It is of course possible that houses in a municipality may be subject to house-tax, but presumably such a tax would be paid by the owner of the house on the estimated rental of the house and not by the ground landlord. At all events it has not been shewn in the present cases, either that the houses in dispute are subject to a tax or that there has been any variation in the rate of rent dependent on a variation in the amount of taxes. Moreover the plaintiffs have not claimed enhancement of rent on the ground of enhancement of taxation.

No doubt the rent of a tenant from year to year, or for a fixed term, can be enhanced at the end of the year, or term—but when the tenancy is for a specified term, the rent cannot be enhanced during that term.

In the present cases there was a permanent tenancy at a fixed rate of rent and it is difficult to see how that rate can be enhanced.

No doubt the land has increased in value but, in securing permanent tenants, the ground landlord fixed the rent for better or worse and if the land had decreased in value, there is no reason to suppose that he would have accepted a lower rate of rent. If the ground landlord could enhance the rent at will, he might enhance it to an extent which would force the tenant to vacate and hence the enhancement of rent is inconsistent with the permanent nature of the tenancy.

We find, therefore, that the rent cannot be enhanced and, as it has been also held that the defendants are not liable to ejectment, it is unnecessary to consider whether the notices were duly served or not.

There remains the question whether defendants in suit No. 48 can be restrained from rebuilding—and our decision on this point follows the decision in respect of the nature of the tenancy. Defendants are permanent tenants of the sites which were let for building purposes and they have a right to reconstruct their houses.

The result is that the appeals by the plaintiffs, Nos. 1047, 1048 and 1049, fail and that the appeals by defendants in suits Nos. 49 and 51 (*i.e.*, appeals Nos. 1043 and 1044) must be accepted.

We accordingly accept this appeal No. 1043 and, setting aside the decree of the lower Appellate Court, we restore the decree of the first Court.

Plaintiffs-respondents will pay defendant-appellant's costs in the lower Appellate Court and in this Court.

Appeal accepted.

Full Bench.

No. 122.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Robertson, Hon. Mr. Justice Kensington, Hon. Mr. Justice Rattigan, Hon. Mr. Justice Chevis and Hon. Mr. Justice Beadon.

DEOKI NANDAN—(DEFENDANT)—APPELLANT

Versus

HARNAM DAS AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 590 of 1912.

Punjab Courts (Amendment) Act, I of 1912, section 6—whether old section 40 of Courts Act is applicable to second appeals from decrees passed after date on which amending Act came into force.

Held, having regard to the terms of section 6 of Punjab Courts (Amendment) Act, I of 1912, that there is no right of further appeal under section 40, Punjab Courts Act, as it stood prior to its amendment by the Act of 1912, from an appellate decree, passed after the date on which the amending Act came into force.

156 P. L. R. 1912 (*Ganda Mal v. Piran Ditta*) (1), *Bhadreswar Golo v. Bishnu Charan Sen* (2), *Rajmohan Pal v. Gobinda Chandra Pal* (3), *Benod Bihari Bahdra v. Ram Sarup Chamar* (4), *Colonial Sugar Refining Company v. Irving* (5), 12 P. R. 1900 (F. B.) (*Narsing Das v. Dholan Das*) (6), *Kalinga Hebba v. Narasimha Hebba* (7) and *Hornsey Local Board v. Monarch Investment Building Society* (8).

(1) 156 P. L. R. 1912.

(2) (1910) 8 *Indian Cases* 3.

(3) 1912) 14 *Indian Cases* 53.

(4) (1912) 16 *Cal. W. N.* 1015.

(5) (1905) *L. R. II. of L. and P. C.* 369.

(6) 12 P. R. 1900 (F. B.).

(7) (1911) 21 *Mad. L. J. R.* 631.

(8) (1889) *L. R.* 24 *Q. B. D.* 1.

Further appeal from the decree of L. Leslie Jones, Esquire, Additional Divisional Judge, Amritsar Division, at Jullundur, dated 25th March 1912.

Petman and Sukh Dial for appellant.

Ganpat Rai for respondents.

The judgment of the Court was delivered by—

28th Oct. 1912.

SIR ARTHUR REID, C. J.—The question for decision is whether the right of further appeal provided by section 40, Punjab Courts Act, as it stood prior to its amendment by the Punjab Courts Act, I of 1912, subsists where the appellate decree attacked was passed after the date on which the amending Act came into force. A similar question was dealt with in 12 P. R. 1900 (F. B.) (*Narsing Das v. Dholan Das*) (1), but the decision in that case does not help the present appellant in his contention that the right of further appeal subsists, inasmuch as it was based on the absence of any provision in the amending Act, XXV of 1899, then under consideration, opposed to the general provision of section 6 of the General Clauses Act, X of 1897. Section 6 of the amending Act, I of 1912, now under consideration is in the following words :—

“Nothing in this Act shall affect any present right of appeal which shall have accrued to any party at its commencement.”

This is a reproduction *totidem verbis* of section 154 of the Civil Procedure Code of 1908, which has been interpreted in several rulings of this and other Courts.

In Civil Appeal No. 452 of 1909, *Sohna Mal v. Nand Lal and others*, it was held by Williams, J., that section 6 of the General Clauses Act being applicable only in so far as a different intention did not appear in the repealing Act and the right of appeal saved by section 154 of the amended Code being a present right of appeal only, the question for consideration was whether the right to appeal against a decree which had not been passed on the date on which the amended Code came into force, could be described as a “present” right on that date. This question was decided in the negative, the learned Judge holding that it would be straining language unduly to call that right a “present” right.

In Civil Appeal No. 64 of 1909 (*Ganda Mal v. Piran Ditta*) (2), reported as 156, Punjab Law Reporter, 1912, Johnstone and Shah Din, JJ., held that, although it might be taken as settled law that the right of appeal in a pending action is not a matter of procedure and that repeal of a statute

(1) 12 P. R. 1900 (F. B.).

(2) 156 P. L. R. 1912.

which was in force at the time when the action was instituted and regulated the course of appeal, does not affect the right of appeal acquired and enjoyed under that statute, unless the repealing statute expressly or by necessary implication takes away the right of appeal, the words "any present right of appeal" in section 154 of the Code meant "the right of appeal in *esse* and not in *posse*," *i.e.*, the right of appeal which had actually come into existence and was capable of being exercised by the aggrieved party on the date on which the Code came into force, by reason of the decree or order appealed from having been passed before that date.

In *Bhadreswar Goloï v. Bishnu Charan Sen* (Miscellaneous Appeal No. 127 of 1910 of the Calcutta Court) (1), Mukerjee and Teunon, JJ., held that an order in execution proceedings made after the Code of 1908 came into force, must be treated as made under that Code, and that a second appeal, which might have been competent under the repealed Code, was incompetent.

In *Rajmohan Pal v. Gobinda Chandra Pal* (Miscellaneous Appeal No. 520 of 1909 of the Calcutta Court) (2), Brett and Carnduff, JJ., held that, where a sale was held in November 1908 and an application to set it aside was made in December following before the commencement, but the order rejecting the application was not made until July 1909, after the commencement of the amended Code, no second appeal lay, although the Code, before amendment, provided a second appeal.

In *Benod Bihari Bahdra v. Ram Sarup Chamar* (second appeal No. 195 of 1910 of the Calcutta Court) (3), Carnduff and Chapman, JJ., held that section 154 of the Code of 1908 expressed a clear intention to limit the operation of the provisions of section 6 of the General Clauses Act, 1897, and that an appeal from an order, passed after the Code came into force, in proceedings instituted before the Code came into force did not lie, not being allowed by the new Code, as the words "present right of appeal" mean only "a right existing on the date, on which the Code came into force, to appeal against a particular order passed under the former Code and subsisting on that date." Referring to *Colonial Sugar Refining Company v. Irving* (4), the learned Judges said—

"The case referred to is, no doubt, the highest authority for holding that the disturbance of an existing right of appeal is not a mere alteration of procedure, and that litigants have

(1) (1910) 8 *Indian Cases* 3.(3) (1912) 16 *Cal. W. N.* 1015.(2) (1912) 14 *Indian Cases* 53.(4) (1905) *L. R. H. of L. and P. C.* 369.

“from the time they come into Court a vested right to any
 “appeal then provided by law. Consequently the general rule
 “against the retrospective operation of a repealing Act applies,
 “and, unless it is otherwise expressly provided, the repealed
 “provisions relating to appeal continue to govern pending
 “cases. Now, the law in India against the retrospective
 “construction of a repealing enactment is to be found in
 “section 6 of the General Clauses Act above referred to, and
 “that section (we quote only so much as is necessary) provides
 “that where an Act repeals any enactment, then, ‘unless a
 “‘different intention appears, the repeal shall not affect any
 “‘right, privilege, obligation or liability acquired, accrued or
 “‘incurred under any enactment so repealed, or affect any
 “‘investigation, legal proceedings or remedy in respect of any
 “‘such right, privilege, obligation or liability as aforesaid;
 “‘and any such investigation, legal proceeding or remedy may
 “‘be instituted, continued or enforced as if the repealing Act
 “‘had not been passed.’ If the matter stood there, we are
 “inclined to think that we should be constrained by the decision
 “of the Privy Council to overrule the preliminary objection.
 “But we must not overlook the words ‘unless a different
 “‘intention appears,’ which control section 6 of the General
 “Clauses Act, 1897, and the provisions of section 154 of the
 “Code of Civil Procedure, 1908, which provides that nothing
 “in the new Code ‘shall affect any present right of appeal
 “‘which shall have accrued to any party at its commencement.’
 “It seems to us that a ‘present right of appeal’ can mean
 “only a right existing on the 1st January 1909, to appeal
 “against a particular order passed under the former Code
 “and subsisting on that date. The words ‘present right’ are
 “well understood. The meaning to be placed upon them is
 “clear, and in this connection we need only refer to the remarks
 “of Lord Esher M. R., in *Hornsey Local Board v. Monarch*
 “*Investment Building Society* (1).”

A.

The passage marginally marked A is in agreement with the ruling in 12 P. R. 1900 (F. B.) (*Narsing Das v. Dholan Das*) (2) and emphasizes the distinction stated above between the 12 P. R. case and the present case.

In *Kalinga Hebba v. Narasimha Hebba* (3), A. A. O. 21 of 1910 of the Madras Court, Abdur Rahim and Ayling, JJ., held that the right of appeal in a pending action is not a matter of procedure; that, where a person had filed an appeal under the old Procedure Code which

(1) (1889) L. R. 24 Q. B. D. 1.

(2) 12 P. R. 1900 (F. B.).

(3) (1911) 21 Mad. L. J. R. 631.

gave him a right of second appeal if the decision went against him, the passing of a new Code which did not give a right of second appeal in a similar case, will not take away the appellant's right of second appeal; and that the words "any present right of appeal" in section 154 of the amended Code do not mean anything more than that no right of appeal which has become vested in a litigant shall be affected by that Code. The learned Judges said "we confess the matter is by no means free from doubt," and relied on their interpretation of "*Colonial Sugar Refining Company v. Irving* (1)" which differs from that of the learned Judges in the XVI Cal. W. N. case (2).

Section 4 of the Punjab General Clauses Act, 1898, is identical with section 6 of the General Clauses Act, 1897. In *Hornsey Local Board v. Monarch Investment Building Society* (3), in dealing with the argument that the words 'present right to receive the same' in a statute were equivalent to "present right to enforce payment of the same," the learned Esher, M. R., said 'If there were some overwhelming reasons why that construction should be given to the words, if that were the only construction that would render the procedure sensible, I think possibly the words might receive that construction, but I do not think that it would be their ordinary meaning in the English language. 'Present right to receive' is not in ordinary English the same as a 'present right to enforce payment.' Then, is there any overwhelming reason why we should read the words otherwise than in their natural sense?.....In the case where person has only a reversionary right to receive money or for some other reason the time when he is entitled to receive the money has not yet arrived, it would be different and there would be no present right to receive the money."

This decision is directly in point and I concur fully in the Punjab and Calcutta decisions cited above. The present right of appeal which has accrued to any party entails the existence of a decree or order to form the subject of an appeal and applying the maxim *expressio unius est exclusio alterius*, I have no hesitation in holding that the express saving of the "present" right indicates clearly the exclusion of any future right not in existence of the date specified. If the words "present" in section 6 of the Courts Act is not redundant, it means that there must be in existence a decree or order to be

(1) (1905) L. R. H. of L. and P. C. 369. (2) (1912) 16 Cal. W. N. 1015.

(3) (1889) L. R. 24 Q. B. D. 1.

the subject of appeal. The contention even if it be conceded to be correct, that the construction most favourable to a party aggrieved by a decree or order must be placed on the terms of the section, does not justify any violation of those terms and, in interpreting them recourse can only be had to other considerations when doubt arises. In my opinion there is no reasonable doubt that the true interpretation of the terms of the section is that stated above.

For these reasons I would answer in the negative the question referred to the Full Bench.

ROBERTSON, J.—I concur.

KENSINGTON, J.—I concur.

RATTIGAN, J.—I concur.

CHEVIS, J.—I concur.

BEADON, J.—I concur.

No. 123.

Before Hon. Sir Arthur Reid, Kt., Chief Judge, Hon. Mr. Justice Kensington and Hon. Mr. Justice Rattigan.

MUSSAMMAT RAM DITTI—(DEFENDANT)—APPELLANT

Versus

AMAR SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Civil Appeal No. 200 of 1910.

Civil Procedure Code, 1908, section 104 (1) (f) and Schedule II, para. 21 (2)—appeal from order filing an award when decree has been made in accordance with it.

Held, that an appeal is competent under section 104 (1) (f) of the Code of Civil Procedure, from an order filing an award, notwithstanding that the order has been followed by a judgment and a decree in accordance with the award, and that no appeal lies from such a decree (*vide* para. 21 (2) of the second schedule).

Janokey Nath Guha v. Brojo Lal Guha (1), 27 P. R. (Cr.) 1910 (F. B.) (*In the matter of a pleader*) (2) and 1 P. R. 1908 (F. B.) (*Shankar Mal v. Nathu Mal*) (3), referred to.

Miscellaneous appeal from the order of Captain J. Frizelle, District Judge, Rawalpindi, dated 22nd December 1909.

Gobind Das for appellant.

Pestonji Dadabhai for respondents.

The order referring the case to a Full Bench was delivered by—

RATTIGAN, J.—Plaintiffs applied to the District Judge, *23rd March 1911*. Rawalpindi, under paragraph 20 of the second schedule to the Civil Procedure Code, 1908, praying that a certain award made by an arbitrator, without the intervention of a Court, might be filed in Court. Notice under clause (3) of the said paragraph was thereupon issued to the defendant, and on the 26th October 1909 the defendant appeared and urged certain preliminary objections to the application which the District Judge overruled by order of that date. Defendant thereupon filed a number of objections to the award itself. Briefly summarized, these objections were (1) that the award was vague and indefinite; (2) that the arbitrator had made no proper inquiry and had exceeded his authority by determining matters which had not been referred to him; and (3) that the plaintiffs had been guilty of fraud and misrepresentation in the course of proceedings before the arbitrator. Defendant did not deny that the subject-matter of dispute had been referred to the arbitrator, or that an award had actually been made.

The District Judge on the 27th October 1909 ordered that the award in question should be sent for and that plaintiffs should file their answer to defendant's objections on the 2nd November 1909. On the latter date the plaintiffs filed their answer to defendant's objections and the case was adjourned to the 5th November. On the 5th November nothing was done, but on the 18th November the District Judge ordered that the agreement to refer should be placed on the record and fixed the 29th November for the next hearing. The agreement was duly brought on the record on the last mentioned date, but as defendant's counsel urged that he was not then prepared to argue the case, the hearing was adjourned to the 1st December 1909. On this date defendant's counsel raised certain objections, based on the provisions of section 35 of the Stamp Act, to the hearing of plaintiffs' application. The District Judge held that the application could be considered if plaintiffs paid in ten times the amount of the proper duty and plaintiffs complied with this order, whereupon the District Judge directed that defendant should produce evidence in support of her objection to the award and fixed the next hearing for the 15th December.

On the said date defendant produced evidence accordingly and closed her case. The District Judge noted this fact and added "orders will be passed later."

Nothing further happened till the 22nd December 1909 when the District Judge delivered judgment, the final paragraph of which runs as follows :—

“ I am therefore of opinion that no such ground as is mentioned or referred to in paragraph 14 or paragraph 15, (2nd schedule, clauses 14 and 15) have been proved, and I therefore order the award to be filed, and give judgment according to the terms of the award, with costs Rs. 50 against defendant. Judgment pronounced in the presence of Sardar Basant Singh, counsel for plaintiffs.” Defendant has preferred an appeal to this Court from that part of the order of the District Judge which directs the award to be filed in Court and as grounds for this appeal, urges the objections to the award which she unsuccessfully urged before the District Judge.

Respondents contend that under clause (2) of paragraph 21 of the 2nd schedule to the Civil Procedure Code, no appeal lies upon these grounds, as the District Judge has now passed a decree in accordance with the terms of the award.

Mr. Gobind Das, for the appellant, admits that no such appeal would lie from the *decree* of the District Judge, but he contends that under section 104, clause (f), of the Civil Procedure Code, his client has the right to appeal from the order filing the award. I confess I have considerable difficulty in reconciling the provisions of section 104 (f) of the Code with the provisions of paragraph 21 of the 2nd schedule. By clause (f) of section 104 an appeal is given from every order filing an award in an arbitration without the intervention of a Court. But then we have the provisions of paragraphs 20 and 21 of the 2nd schedule and the terms of the latter paragraph clearly imply that the Court is not to order the award to be filed in Court until it is satisfied (1) that the matter has been referred to arbitration ; (2) that an award has been made thereon ; and (3) that no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved. This may or may not have been the intention of the legislature, but it is clear from the wording of paragraph 21 that this is the course which the Courts have to adopt. Then, when the Court is so satisfied, the paragraph directs that “ *it shall order the award to be filed and shall proceed to pronounce judgment according to the award,*” and clause (2) enacts that “ upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.”

If then paragraph 21 is to read in the ordinary way, the result is anomalous. The order that the award is to be filed is not to be passed until *all* objections have been considered and the Court is satisfied upon all three of the points above mentioned. Then, and not till then, such order is to be passed and it is to be followed (apparently in immediate sequence but certainly without reference to any further materials before the Court) by a judgment and decree in accordance with the award. From the decree so passed no appeal is to lie except upon the special grounds specified, but under section 104 (f) an appeal (in apparently unrestricted form) can lie from the order directing the award to be filed.

This latter provision would obviously render the provisions of clause (2) of paragraph 21 of the 2nd schedule nugatory but I confess I find it very difficult to reconcile these conflicting provisions.

Mr. Beechey suggests that paragraph 21 of the 2nd schedule was intended to run as follows :—

“ When the Court is satisfied that the matter has been referred to arbitration and that an award has been made, the Court shall order the award to be filed, and when no ground such as is mentioned or referred to in paragraph 14 or paragraph 15 is proved the Court shall proceed to pronounce judgment according to the award.”

It may well be that this was the intention of the legislature and this construction would certainly remove the difficulty which I feel in the present case. But as at present advised I do not feel justified in re-arranging the words of the paragraph which are perfectly clear in themselves. The District Judge in this case has strictly followed the procedure prescribed in paragraphs 20 and 21, with the result that either the defendant is given a right of appeal which would go to the root of the decree passed by the District Judge and so infringe the provisions of clause (2) of paragraph 21, or has been entirely deprived of the right of appeal given by section 104 (f).

The question whether in these circumstances an appeal lies or not, is one of great importance and very great difficulty, and I think my best course is to refer it to a Full Bench for determination, so that there may hereafter be no doubt upon the subject. I refer it accordingly.

The judgments of the Full Bench were as follows :—

The judgment of Sir Arthur Reid, C. J. and Mr. Justice Kensington was delivered by—

SIR ARTHUR REID, C. J.—The question referred to the Full Bench is whether an appeal lies under section 104 (f) of 20th May 1911.

the Code of Civil Procedure from an order filing an award in an arbitration without the intervention of the Court in spite of the fact that the Court has under clause (21) (1) of the 2nd schedule to the Code proceeded to pronounce judgment according to the award. The pleader for the appellant contended that, inasmuch as section 104 (f) gives an appeal, that appeal is not taken away by clause 21 (2) of the 2nd schedule which provides that no appeal shall lie from a decree which follows the judgment based on an award ordered to be filed except in so far as the decree is in excess of, or not in accordance with, the award. This position is, in our opinion, unassailable.

Counsel for the respondent was reduced to asking us to take clause 21 (1) to pieces and to interpose the words "the Court shall order the award to be filed" between the words "has been made thereon" and the words "and where no ground such as is mentioned or referred to." No authority for this proposition has been cited. *Janokey Nath Guha v. Brojo Lal Guha* (1) and 27 P. R. (Cr.) 1910 (F. B.) (*In the matter of a pleader*) (2), cited by counsel for the respondent, cannot by any stretch of imagination be considered authority for the proposition. The Calcutta case interpreted sections of the previous Code which have been very materially altered in the present Code and the Judges certainly did not treat any section as we are asked to treat clause 21 (1).

1 P. R. 1908 (F. B.) (*Shankar Mal v. Nathu Mal*) (3), dealt with the previous Code. In the 1910 Punjab Record case cited the Division Bench merely interpreted a section of the Legal Practitioners Act and did not take it to pieces and reconstruct it as counsel has asked us to do.

The language of section 104 (f) is very clear and in our opinion the fact that a later provision of the Code bars an appeal from a decree based on an award does not cancel the earlier provision.

The framers of the Code, in allowing the appeal under section 104 (f), acted in accordance with a very generally expressed opinion that such appeal was necessary and the two provisions of the Code cited are not, in our opinion, antagonistic, while the fact that the judgment and decree go with the order filing the award when that order is set aside, does not, in our opinion, affect the question.

If the order filing an award is set aside, there is no award on which judgment and decree can be based, and under

(1) (1906) I. L. R. 33 Cal. 757 (F. B.). (2) 27 P. R. (Cr.) 1910 (F. B.).
(3) 1 P. R. 1908 (F. B.).

clause 20 (1) absence of proof of any ground such as is mentioned or referred to in "paragraph" 14 or "paragraph" 15 of the 2nd schedule (for paragraph "clause" should apparently be read) is a condition precedent to passing an order filing the award. For these reasons our answer to the reference is in the affirmative.

The judgment of Mr. Justice Rattigan was as follows :—

RATTIGAN, J.—I agree that in every case an appeal lies under section 104 (f) of the Civil Procedure Code, from an order filing or refusing to file an award in an arbitration without the intervention of the Court, and that paragraph 21 of the 2nd schedule cannot be re-arranged in the manner suggested by the learned counsel who appeared for the respondent. But I regret that I cannot subscribe to the opinion that the two provisions of the Code are not antagonistic. 22nd May 1911.

With every deference, I adhere to the opinion I expressed in the referring order to the effect that the two provisions are in direct conflict for all practical purposes. It is obvious from paragraph 21 (2) of the 2nd schedule that a decree following a judgment pronounced thereunder was intended to be final and unassailable upon appeal. But it is equally clear that such decree merely follows, *as a matter of course*, when once the order filing the award has been passed under sub-clause (1) of paragraph 21, and that the result of allowing an appeal from the order filing the award is tantamount to allowing an appeal from the decree. Every objection that can possibly be urged by the person who objects to the filing of the award has, *ex hypothesi* been heard and decided against him before the order filing the award is passed; the Court then proceeds to pass the latter order, and *immediately thereafter* pronounces judgment and a decree follows as a matter of routine. I presume the legislature had some object in view in enacting that "no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, such award." But if so, its intentions are to all intents and purposes nullified by the provision in clause (f) of section 104 of the Code which allows in unqualified terms a right of appeal from every order filing an award, and thereby renders it possible for the appellant indirectly to assail a decree which was clearly intended not to be assailable directly. I accept the proposition that this right of appeal must be maintained, and that the Courts must give full effect to it, despite the fact that by so doing they will enable the appellant to attack a decree which was intended to be *sacro-sanct*. If I may

venture, with all respect and diffidence to say so, I am inclined to agree with the argument that the *intention* of the legislature was to allow an appeal from the order filing an award merely when such order dealt with the objections that the matter had not been referred to arbitration or that no award had in fact been passed, and I believe it was with reference to such matters that the consensus of opinion was that an appeal should be permitted. But as it stands, paragraph 21 (1) of the 2nd schedule goes far beyond this, and directs that the order filing the award is to be passed when the Court finds (1) that the matter has been referred to arbitration ; (2) that an award has been made thereon ; and (3) that no ground such as is mentioned in paragraph 14 or paragraph 15 is proved. We must take this paragraph as it stands and we must also maintain the right of appeal given by clause (f) of section 104, but I think we must admit that by so holding, we shall be compelled in many cases, of which the present is a type, to render nugatory the provisions of paragraph 21 (2) of the Code. This will be the indirect result of our decision, but I can see no way out of the difficulty, and my only object in adding these few lines is to make it clear that I fully recognize the consequences, and that I am not able to accept the view that the two provisions of the Code are not antagonistic.

No. 124.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

ACHAR SINGH AND OTHERS—(PLAINTIFFS)—
PETITIONERS

Versus

BADHAWA SINGH—(DEFENDANT)—RESPONDENT.

Civil Appeal No. 126 of 1912.

*Indian Limitation Act, IX of 1908, section 32, articles 32, 120, 142—
suit for ejectment of defendant from village shamilat—limitation.*

Plaintiffs' suit was for ejectment of the defendant from a specific field recorded as part of a thoroughfare and *shamilat*. The suit was not for possession by establishment of plaintiffs' exclusive right to the property in suit but was nominally on behalf of the village community to remove an obstruction to the enjoyment of the *shamilat* by the proprietors generally.

Held, that section 32 of the Limitation Act had no application to the suit and that it was governed by article 120 and not by article 142.

8 P. R. 1899 (*Narain Singh v. Ishar Singh*) (1) and 9 P. R. 1904 (*Asa Ram v. Paras Ram*) (2), followed and *Sree Mati Soojan Bibi v. Shamed Ali* (3), *Sharoop Dass Mondal v. Joggessur Roy Chowdhry* (4) and *Muhammad Amanulla Khan v. Badan Singh* (5), referred to.

Further appeal from the decree of L. Leslie Jones, Esquire, Divisional Judge, Jullundur, dated 28th August 1911.

Nihal Chand for appellants.

Sheo Narain for respondent.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—The facts are stated in the judgment of the lower Appellate Court. The appeal was admitted under section 70 (1) (b) on the question of limitation only. 15th May 1912.

The plea that section 23 of the Limitation Act applies to the suit, by reason of the act complained of by the plaintiffs being a continuing wrong and a fresh period of limitation beginning to run at every moment of time during which the wrong continues has no force. The suit was for ejectment of the respondent from a specific field and the fact that that field had been recorded as part of a thoroughfare and *shamilat-i-deh* does not bring this suit within section 23. It was found by a Revenue Court several years ago that in spite of various encroachments the road was sufficiently broad for the use of the public, and the encroachment now complained of was made before that finding. There has been no interruption of the right of way itself and *Sree Mati Soojan Bibi v. Shamed Ali* (3) does not help the appellants. In that suit the plaintiff claimed a right of way over the defendant's land, basing his claim on section 26 of the Limitation Act and on a previous decree giving him the right of way. It was held that any interruption of the easement gave the plaintiff a recurring cause of action *de die in diem* under section 23 and that the two years' rule prescribed by section 26 was not applicable. The nature of that suit differs clearly from the nature of the present suit, the object of which is to oust the respondent from a specific portion of the *shamilat-i-deh* occupied by him, adversely to the rest of the proprietors.

Authorities on the question of limitation for suits arising out of diversion of water are obviously not in point.

8 P. R. 1899 (*Narain Singh v. Ishar Singh*) (1), is in point and supports the conclusion of the lower Appellate Court, that article 120 of the Limitation Act governs the case. This

(1) 8 P. R. 1899.

(3) (1892) 1 Cal. W. N. 96.

(2) 9 P. R. 1904.

(4) (1899) I. L. R. 26 Cal. 564 (F. B.).

(5) (1889) I. L. R. 17 Cal. 137 (P. C.).

authority was approved in 9 P. R. 1904 (*Asa Ram v. Paras Ram*) (1). The suit was not for possession by establishment of the plaintiffs' exclusive right to the property in suit, but was nominally on behalf of the village community to remove an obstruction to the enjoyment of the *shamilat* by the proprietors generally.

The learned pleader for the respondent contended that article 32 prescribing two years' limitation from the date of the appropriation of the land in suit applied and cited *Sharoop Das Mondal v. Jaggesur Roy Chowdhry* (2). As at present advised I am inclined to hold that article 32 is not applicable and that article 120 is applicable, 146 A. obviously is not applicable, as the suit is not by, or on behalf of, any local authority.

The argument for the appellants that article 144 is the general article for suits of this description, is based on a dictum of Their Lordships of the Privy Council in *Muhammad Aman-ulla Khan v. Badan Singh* (3). The dictum is, "article 144 " as to adverse possession only applies where there is no other " article which specially provides for the case." This obviously does not bear the interpretation sought to be placed on it for the appellants, and article 144, like article 142, applies to suits for possession based on the plaintiffs' title, not to suits of the nature now under consideration.

The lower Appellate Court has held on the facts that the respondent was in adverse possession for far more than six years before the date of suit, and in my view of the applicability of article 120 the suit is barred by limitation. The appeal fails and is dismissed with costs.

Appeal dismissed.

No. 125.

Before Hon. Sir Arthur Reid, Kt., Chief Judge.

BUDH SINGH AND OTHERS—(DEFENDANTS)—
PETITIONERS

Versus

RAM NATH AND ANOTHER—(PLAINTIFFS)—
RESPONDENTS.

Civil Revision No. 2038 of 1911.

Civil Procedure Code, 1908, section 104 (1) (a)—appeal from order superseding arbitration, because arbitrator seemed to be of opinion that case was premature—material irregularity—revision.

This was an application for revision from the order of the District Judge setting aside the appointment of one R as an arbitrator on the ground that—

(1) 9 P. R. 1904.

(2) (1899) I. L. R. 26 Cal. 564 (F. B.).

(3) (1889) I. L. R. 17 Cal. 137 (P. C.).

he had apparently formed an opinion to the effect that the case was premature.

Held, that no appeal was competent under section 104 (1) (a) of the Code of Civil Procedure, the arbitration not having been superseded under schedule II, clause 8.

Held also, that the order being materially irregular was open to revision and must be set aside, there being no authority for the procedure adopted by the Court below.

37 P. R. 1895 (*Hira v. Dina*) (1), referred to.

Petition for revision of the order of Lala Achhru Ram, District Judge, Ferozepore, dated 27th July 1911.

Nand Lal, for petitioners.

Sheo Narain, for respondents.

The judgment of the learned Chief Judge was as follows :—

SIR ARTHUR REID, C. J.—I concur with Mr. Justice Shah Din, 31st May 1912.
who issued notice, in the opinion that no appeal under section 104 (1) (a) of the Code of Civil Procedure lies, the arbitration not having been superseded under schedule II, clause 8 of the Code, and I also concur in the opinion that revision lies, the proceedings of the Court below in superseding the arbitration having been materially irregular. The arbitrator had not delivered an award and the proceeding held by the Court below to indicate prejudice was preliminary. The provisions of the Code for dealing with awards are therefore inapplicable and the learned pleader for the respondents has been unable to cite any authority for the procedure adopted by the Court below. Schedule II, clause 15 (1) (a), cited by him is limited to awards. Here there was no award. The plea that the reference to arbitration was bad by reason of the parties being minors and sanction of the Court not having been granted under order XXXII, rule 7 has apparently no force even if the rule applies to references to arbitration, the submission to arbitration having been through the Court and the arbitrator having been deliberately selected.

37 P. R. 1895 (*Hira v. Dina*) (1) is authority for interference on the revisional side where the Court below has adopted procedure not prescribed by the law and no other remedy is available.

The application is allowed and the order of the 27th July 1911, setting aside the appointment of Lala Rana Nand as arbitrator, is set aside, with costs.

Revision accepted.

Privy Council.

No. 126.

*Present :—**Lord Macnaughten.**Lord Robson.**Sir John Edge.**Mr. Ameer Ali.*

MUHAMMAD UMAR KHAN AND OTHERS—

(PLAINTIFFS)—APPELLANTS

*Versus*MUHAMMAD NIAZ-UD-DIN KHAN—(DEFENDANT)—
RESPONDENT.

(Chief Court Civil Appeal No. 129 of 1902).

Custom—alienation—gift of ancestral land by father to daughter—estate taken by donee—Ansari Sheikhs of Basti Danishmandan, Jullundur District—evidence and proof of custom—suit for possession—limitation—Indian Limitation Act, XV of 1877, schedule II, article 118—ineffective adoption—Muhammadian Law.

The appellants claimed possession of the property in suit on the allegation that it was ancestral property to which they were entitled as reversioners. The defence was that the respondent was in possession under a gift from the last owner, a Muhammadan lady, who had adopted him as her heir, and who had herself received the property in dispute as a gift from her father in lieu of her mother's dower; and that the suit was barred by limitation. The parties were Sheikh Ansaris of Basti Danishmandan, Jullundur District, and the appellants' case was that according to a custom prevailing in the family no woman could take by gift a greater interest in ancestral property than an estate for life, without power of alienation, and that the gift to the respondent was therefore void.

Held, that the plaintiff had failed to prove the alleged family custom which limited the estate in ancestral lands which came to a daughter by gift to a mere life estate and which prevented a daughter from alienating such lands by gift in her lifetime and that evidence of a custom as to limited rights of a widow in her deceased husband's property or evidence of a custom preventing a Muhammadan father from giving his property to one son to the exclusion of another had no bearing on the issue.

Semble that the omission to bring within the period prescribed by article 118 of the second schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid or never in fact took place is no bar to a suit like this for possession of property.

Tirbhuwan Bahadur Singh v. Rameshar Bakhsh Singh (1), followed.

Under the general Muhammadan Law an adoption cannot be made, and even if it be made, can carry with it no right of inheritance.

Appeal from the judgment and decree of the Chief Court of the Punjab (Johnstone and Rattigan, JJ.), dated the 18th April 1906 (1).

De Gruyther, K. C. and Abdul Majid for appellants.

Sir R. Finlay, K. C. and Considine O'Gorman for respondent.

The judgment of their Lordships was delivered by—

SIR JOHN EDGE.—This is an appeal from the decree of the Chief Court of the Punjab, dated the 18th of April 1906, reversing the decree of the District Judge of Jullundur, dated the 13th January 1902, which had decreed the plaintiffs' claim. 14th Dec. 1911.

The plaintiffs brought this suit on the 11th of May 1900 to obtain possession of certain immovable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held for her life by Mussammat Zainab, by virtue of a gift made to her by her father, Sarfraz Khan, an uncle of the plaintiffs, and that on her death on the 4th of May 1899 the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in their plaint that Mussammat Zainab had not, in fact, transferred the property to the defendant, and that if she had transferred the property to him such transfer was, by law, according to the custom of the tribe to which the parties belong, and the *Riwaj-i-am*, null and void as against the plaintiffs as reversionary heirs.

The defendant by his pleadings alleged title as owner in himself by gift from Mussammat Zainab, alleged that Mussammat Zainab was entitled to the full estate in the property in question, and not merely to an estate for her life, denied that the plaintiffs had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by Mnssammat Zainab.

The parties to the suit are Sheikh Ansaris of a Pathan tribe of Punjab Muhammadans. The defendant is in possession of the property in dispute under a gift from Mussammat Zainab made to him in her lifetime. The plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing

and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by Mussammat Zainab to the defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the plaintiffs a decree for possession. From that decree the defendant appealed to the Chief Court of the Punjab. The Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the alleged adoption of the defendant by Mussammat Zainab, which was an immaterial issue, and having apparently, although somewhat uncertainly, found that Mussammat Zainab had adopted the defendant, they applied article 118 of the second schedule of the Indian Limitation Act, 1877, to the case, allowed the appeal, and dismissed the suit with costs.

Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by article 118 of the second schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakar Tirbhuvan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (1). Under the general Muhammadan law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Muhammadan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case it is necessary to refer to the pedigree of the plaintiffs. Muhammad Ali Sher, the common ancestor of the plaintiffs and Mussammat Zainab, had three sons, one of whom, Jehangir Khan, had by his wife, Mussammat Fatima, a daughter, Mussummat Maryam, who married her cousin, Sarfraz Khan.

(1) (1906) *I. L. R.* 28 *All.* 727; *L. R.* 33 *I. A.* 156.

Alamgir, another son of Muhammad Ali Sher, had three sons, one of whom was Sarfraz Khan, who married his cousin Mussammat Maryam; another son of Alamgir was Shahbaz Khan; and the other son of Alamgir was Siraj-ud-Din, otherwise called Sheraz-ud-Din Khan, who was the father of the plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one of whom was Muhammad Said; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife Mussammat Maryam, a daughter Mussammat Zainab, who married Ghulam Mohy-ud-Din *alias* Baghe Khan. The defendant is a son of Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *alias* Baghe Khan.

On the 3rd Ramzan 1248 A.H., Jehangir Khan, by his deed of gift, gave to his daughter Mussammat Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother Mussammat Fatima. Mussammat Maryam obtained possession of the property which had been given to her by her father Jehangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. Mussammat Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from Mussammat Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan, and Sheraz-ud-Din. In that case Sheraz-ud-Din, Shahbaz Khan and Muhammad Bahadur Khan, proved that Mussammat Maryam had been in possession of the property, and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with zamindari dues, and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to Mussammat Maryam, and Sheraz-ud-Din admitted that a deed of gift had been executed and that possession had been delivered to Mussammat Maryam. Several other witnesses, including the marginal witnesses to the deed of gift, proved that the property had remained in the possession of Mussammat Maryam for her lifetime,

and had, after her death, passed to Sarfraz Khan, her husband. On the 16th of May 1849 the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfraz Khan should retain possession of the land then in suit. From that order of the Deputy Collector Muhammad Bahadur Khan appealed to the Settlement Officer, who, on the 3rd of August 1849, dismissed the appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to, the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a Civil Court. No suit was brought in a Civil Court to contest the right or title of Sarfraz Khan to the land which had come to him from Mussammat Maryam. The facts above referred to afford, in their Lordships' opinion, strong evidence that there was no custom applying to this family which limited the estate in ancestral lands which came to a daughter by gift to a mere life estate, and which prevented a daughter alienating such lands by gift in her life time.

On the 15th of December 1851, Sarfraz Khan, who was then in possession of the lands which had come to him by gift from his wife Mussammat Maryam, and was also in possession of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter Mussammat Zainab absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the Patwari of Basti Danishmandan, on enquiry of Mussammat Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband Ghulam Mohy-ud-Din, whose name was accordingly entered on the 10th of May 1852. In or about 1859 Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue Court of the Extra Assistant Commissioner of Jullundur against Ghulam Mohy-ud-Din, in which they claimed possession of the lands which had come through Mussammat Maryam and Sarfraz Khan to Mussammat Zainab. The plaintiffs in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of Mussammat Zainab; that the property in suit could not have passed through his wife Mussammat Zainab to Ghulam Mohy-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the Patwari

of Basti Danishmandan was examined as a witness, and in reply to the question—"In Basti Danishmandan what custom prevails in respect of an estate left by a sonless proprietor?" said—

"The following custom prevails:—The estate of a proprietor dying childless goes to his daughters. Should he make a gift of his property during his lifetime in favour of his daughters, they succeed to their father's estate. If he does not make a gift in favour of his daughters during his lifetime, his brothers and brothers' sons succeed to his estate."

Ghulam Mohy-ud-Din gave evidence in that suit; he claimed no title in himself; he said that his wife Mussammat Zainab was the proprietor, and that she had full authority to have her own name inserted in the official papers or to allow the entry in his name to stand. Many other witnesses were examined in that suit, and on the 25th of June 1859 the Extra Assistant Commissioner of Jullundur dismissed the suit. From that order, dismissing the suit, Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), who had apparently come into the suit as a plaintiff, Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Deputy Commissioner, who on the 31st of December 1859 rejected the appeal, but holding that as Mussammat Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Commissioner of Jullundur, who on the 25th of February 1860 dismissed their appeal.

On the 6th of May 1887 Baghe Khan (Ghulam Mohy-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-Din Khan, the defendant in this suit.

On the 22nd of May 1888 Ghulam Mohy-ud-Din Khan and his wife Mussammat Zainab executed a deed of settlement by which Ghulam Mohy-ud-Din gave certain property of his in Basti Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan, and Mussammat Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this suit. In that deed it is stated that Muhammad Niaz-ud-Din Khan had been placed in possession. An application was made to enter the name of the defendant Muhammad Niaz-ud-Din Khan in the column of proprietors in respect of the property in dispute in this suit, and Mussammat Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in

possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Umar Khan, and Muhammad Pirdad Khan, were by agreement between them partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of Mussammat Zainab. Mussammat Zainab was then alive ; she died on the 4th of May 1899.

Their Lordships consider that these partition proceedings between Muhammad Umar Khan, Muhammad Pirdad Khan, and Muhammad Niaz-ud-Din Khan, who were the original parties to this suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the defendant in the suit, and respondent in this appeal. The evidence which was given on behalf of the plaintiffs to prove that a custom existed and applied to this family, by which a female could take only a life interest in the ancestral property which had come to her by gift from her sonless father, and had in such property no power to alienate it by a gift in her life-time, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence from which the custom alleged by the plaintiffs in this suit could be inferred. Nor was evidence that a Muhammadan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence, to which reference has been made by their Lordships, relating to the devolution of Jehangir Khan's share to Mussammat Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the plaintiffs.

Their Lordships find that not only have the plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that Mussammat Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the defendant.

Their Lordships will humbly advise His Majesty that the decree of the Chief Court of the Punjab dismissing the suit of the plaintiffs should be affirmed and this appeal be dismissed with costs.

Appeal dismissed.

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CANTONMENT CODE, 1899.

SECTIONS 94 AND 104.

Notice requiring owner to repair or demolish houses—illegality of such notice.

Petitioner was convicted of not complying with a notice issued by the Lahore Cantonment authority under section 94 of the Cantonment Code. The notice required him "to repair or demolish his houses and level the site within fifteen days".

Held, reversing the conviction, that the notice was illegal, inasmuch as it did not state the precise nature and extent of the repairs which in the opinion of the Cantonment authority he should execute in the interests of the safety of the occupier or of the public, as required by section 94 of the Cantonment Code.

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Must be examined, before inquiry and report can be called for under section 202, Criminal Procedure Code, or before his complaint can be dismissed under section 203.

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CRIMINAL PROCEDURE CODE.

(1) SECTION 107.

Security to keep peace—persons not likely to commit breach of peace themselves, but likely to incite their partisans to do so.

Held, that a finding in regard to certain persons that they are not likely themselves to commit a breach of the peace but may very likely incite their partisans so to do, does not warrant taking security under section 107, Criminal Procedure Code, from such persons.

64 P. R. (Cr.) 1887, (*Empress v. Badhawa Singh*) and *Ram Coomar Banerjee v. Raja Gopal Singh Deb*, (1872) 17 W. R. (Cr.) 54, referred to.

... .. No 4 P. R. (Cr.) 1912.

(2) SECTIONS 202 AND 203.

Complaint not to be sent for investigation or dismissed without taking complainant's statement.

Held, that unless a complainant is duly examined, inquiry and report cannot be called for under section 202, and if made, are made without jurisdiction and cannot form the basis for any further action.

Muhadeo Singh v. Queen Empress, (1907) 1 L. R. 27 Cal. 921 and *Budh Nath Mahato v. Empress*, (1899) 4 Cal. W. N. 305, referred to.

Held also, that a complaint cannot in law be dismissed under section 203 of the Code unless and until the complainant has been examined in respect of that complaint.

Haludhar Bhumi v. Sub-Inspector Police, (1905) 9 Cal. W. N. 199 and *Lokenath Patra v. Sungasi Charan Manna*, (1903) 1 L. R. 30 Cal. 923, referred to.

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(3) SECTIONS 403 (4) AND 213.

Trial for another offence, constituted by the same acts, of a person who has been acquitted by a Magistrate not competent to try such offence—validity of order of commitment to Court of Sessions made in pursuance of order of Sessions Judge.

Held, that under the provisions of section 403 (4), Criminal Procedure Code, a person who has been acquitted by a Magistrate

CRIMINAL PROCEDURE CODE—concl'd.

of offences under sections 325, 326 and 148 Penal Code, may be tried subsequently for an offence under section 302, the Magistrate not being competent to try the latter offence.

Held also, that an order of commitment to the Court of Sessions is none the less valid because it was made in pursuance of an order by the Sessions Judge

Emperor v. Zuji, (1905) B. L. R. 125, followed.

Baijnath Pandey v. Gauri Kanta Mandal, (1893) I. L. R. 20 Cal. 633, distinguished.

... .. No. 7 P. R. (Cr.) 1912.

(4) SECTIONS 435, 436, 437, 438.

Competency of Sessions Judge to report to Chief Court an order of a District Magistrate for further inquiry into the case of an accused person, discharged by an inferior Criminal Court.

Held, that the prohibition contained in section 435 (4) of the Code of Criminal Procedure, extends to all cases in which either a District Magistrate or a Sessions Judge has taken action or refused to take action under sections 435, 436, 437 or 438 of the Code, and that consequently a Sessions Judge is not competent under section 438 to report to the Chief Court the order of a District Magistrate ordering further inquiry by a subordinate Criminal Court into the case of an accused person, who has been discharged by that subordinate Criminal Court.

Kalimuthu v. Emperor, (1902) I. L. R. 26 Mad. 477 and *In re Karpurasundaram Pillai*, (1906) 17 Mad. L. J. 153, referred to.

(5) SECTIONS 454 AND 460.

Trial of "European British subject" or "European" where no claim for trial as such is made before Sessions Judge.

Held, that where an European British subject or European makes no claim before the Sessions Judge to whom he has been committed for trial, to the privilege allowed to him under sections 454 and 460, Criminal Procedure Code, respectively, no objection to his trial with the aid of Indian Assessors can be entertained in the Chief Court on appeal.

... .. No. 6 P. R. (Cr.) 1912.

E

EUROPEAN

Or European British subject—trial of—before Sessions Court with Indian assessors, where no claim was made to be tried as an European or European British subject.

See *Criminal Procedure Code* (5).

... .. No. 6 P. R. (Cr.) 1912.

F

FOREST PRODUCE.

Confiscation of—under section 54, Indian Forest Act—for forest offence

See *Indian Forest Act*.

... .. No. 1 P. R. (Cr.) 1912.

I

INDIAN ARMS ACT.

SECTIONS 19 AND 20.

What constitutes offence under latter section.

Held, that section 20 of the Arms Act applies only to cases where the import or export of arms is attempted.

Crown v. Azu, (1906) 9 Cr. L. J. 259 (F. B.) and *Ahmed Hossein v. Empress*, (1900) I. L. R. 27 Cal. 692, followed.

... .. No. 9 P. R. (Cr.) 1912.

INDIAN FOREST ACT.

VII of 1878, sections 32, 54 and 55—confiscation of timber—not the property of Government—proceeds go to Forest Department.

Held, that timber or forest produce, even when not Government property, in connection with which a forest offence has been committed, may be confiscated under section 54 of the Indian Forest Act, 1878, and under section 55 the proceeds should go to the Government in the Forest Department; the proper procedure being to make over the timber or produce *in specie* to the Forest Officer.

... .. No. 1 P. R. (Cr.) 1912.

INDIAN PENAL CODE.

SECTION 180

Witness refusing to thumbmark his deposition—Civil Procedure Code, Act V of 1908, order 18, rule 5 and sections 151 and 122—Chief Court Circular Orders—correction slip No. 61 of 29th August 1904.

Held, that a witness in a Civil case is not bound to sign, or affix his thumbmark to, the record of his deposition (*vide* order 18, rule 5, Civil Procedure Code, 1908) nor is the Court authorized under section 151 of the Code or by virtue of correction slip No. 61 of 29th August 1904 of the Circular Orders of the Chief Court to compel a witness to do so, and consequently the latter's refusal does not constitute an offence under section 180 of the Penal Code.

6 *Mad. High Court Report App. side XIV*, and *Imperatrix v. Sir Sapa*, (1877) I. L. R. 4 Bom. 11, referred to.

... .. No. 8 P. R. (Cr.) 1912.

W

WITNESS

In Civil Court—not bound to sign his deposition.

See *Indian Penal Code*.

... " No. 8 P. R. (Cr.) 1912.

WORKMAN'S LIABILITY ACT.

Summary trial, not admissible—order for imprisonment in default—when to be made.

Held, that cases under Act XIII of 1859 cannot be tried summarily.

Held also, that the procedure laid down in sections 2 and 3 of the Act must be carefully followed, and order for imprisonment in default can only be made *after* the labourer has failed to comply with the order calling on him to refund the money or get the work performed, as the case may be.

Emperor v. Dhondu, (1904) I. L. R. 33 Bom. 22, followed.

... " No. 5 P. R. (Cr.) 1912.

Chief Court of the Punjab.

CRIMINAL JUDGMENTS.

No. 1.

Before Hon. Mr. Justice Johnstone.

CROWN

Versus

SADAPUR, AND OTHERS—(ACCUSED).

Criminal Revision No. 570 of 1911.

Indian Forest Act, VII of 1878, sections 32, 54 and 55—confiscation of timber—~~not~~ the property of Government—proceeds go to Forest Department.

Held that timber or forest produce, even when not Government property, in connection with which a forest offence has been committed, may be confiscated under section 54 of the Indian Forest Act, 1878, and under section 55 the proceeds should go to the Government in the Forest Department; the proper procedure being to make over the timber or produce *in specie* to the Forest Officer.

Case reported by Major Powney Thompson, District Magistrate, Kangra, the 12th April 1911.

The facts of this case are as follows :—

That the accused sold 87 maunds, 32 seers of *karroo* (*Gentiana karroo*), and the Magistrate ordered that they be confiscated and sale-proceeds credited to Government.

Each of the accused, except Chharang Giaju, on conviction by Mr. J. Coldstream, Assistant Commissioner, exercising the powers of a Magistrate of the 1st class in the Kulu Sub-Division, Kangra District, were sentenced, by order, dated 21st November 1910, under section 32 of the Forest Act, VII of 1878, to a fine of one rupee.

The proceedings are forwarded for revision on the following grounds :—

I do not propose to in any way interfere with the Magistrate's order as far as it affects the accused persons. My object in making this reference is to get that part of the order, which deals with the disposal of the property, set aside.

The accused were convicted of a forest offence under section 32, Act VII of 1878, with respect to 87 maunds, 32 seers of

karroo (*Gentiana karroo*). The Magistrate confiscated and ordered it to be sold and the proceeds credited to Government (Law and Justice). The net proceeds amounted to Rs. 819-15-8 which has been paid into the treasury. The correspondence between my predecessor, Mr. H. A. Casson, the Assistant Commissioner, Kulu, Mr. J. Coldstream and the Assistant Conservator, Forests, Kulu Sub-Division, is attached. It appears to me to be satisfactorily established by this that the *karroo* in question was not wholly the property of Government but was the property of the shareholders in the Kunawar Forests, and that Government in the Forest Department has a prescriptive right to share in the proceeds since it (the *karroo*) has been extracted by persons other than such share-holders.

I therefore suggest that the Magistrate's order should be varied in so much as that the order regarding the disposal of the property should be "the *karroo* will be sold and the proceeds after deduction of the expenses of the sale, &c., shall be divided as follows :—half to the Forest Department, half for division among the share-holders in the Kunawar Forests, in accordance with their respective rights."

ORDER OF THE CHIEF COURT.

15th July 1911.

JOHNSTONE, J.—In the present case the whole of the proceeds of sale of *karroo* must go to the Forest Department. The Magistrate rightly confiscated the stuff in full, for Government has at least a large interest in it, and it was apparently solely through the zeal of Government officers in the Forest Department that the offence was brought to light and further damage stopped. Under section 54 of the Act, timber, &c., even when not Government property in connection with which a forest offence has been committed, may be confiscated, and thus it is clear that the Magistrate's order of *confiscation* was not illegal in any way. And from section 55, it follows upon this that the proceeds must go to Government in the Forest Department. I think the Magistrate should have literally made over the *karroo* to the Forest Officer to dispose of, but this is a minor point.

I therefore direct that the Magistrate's order be so modified as to make the sum realised by the sale of *karroo* in this case a credit to the Forest Department and not to Law and Justice.

In future the Magistrates should always make over the timber or produce *in specie* to the Forest Officer.

Revision accepted.

No. 2.

Before Hon. Mr. Justice Rattigan.

ALI MUHAMMAD—(ACCUSED)—PETITIONER,

Versus

EMPEROR—RESPONDENT.

Criminal Revision No. 721 of 1911.

Criminal Procedure Code, Act V of 1898, sections 202 and 203—complaint not to be sent for investigation or dismissed without taking complainant's statement.

Held that unless a complainant is duly examined, inquiry and report cannot be called for under section 202 and if made, are made without jurisdiction and cannot form the basis for any further action.

Mahadeo Singh v. Queen-Empress ⁽¹⁾ and *Budh Nath Mahato v. Empress* ⁽²⁾ referred to.

Held also that a complaint cannot in law be dismissed under section 203 of the Code unless and until the complainant has been examined in respect of that complaint.

Haladhar Bhumij v. Sub-Inspector Police ⁽³⁾ and *Lokenath Patra v. Sanyasi Charan Manna* ⁽⁴⁾ referred to.

Petition under section 439 of the Criminal Procedure Code for revision of the order of P. D. Agnew, Esquire, Sessions Judge, Gujranwala, Division, at Lahore, dated the 19th May 1911.

Shahab-ud-Din, for petitioner.

Nemo, for respondent.

The judgment of the learned Judge was as follows :—

RATTIGAN, J.—I regret to say that the facts of the case *24th August 1911*, are not quite accurately set forth in the judgment of the learned Sessions Judge, possibly owing to his disposing of the petition before him without hearing the petitioner's pleader. The actual facts were as follows :—

On the 18th April 1911, one Ali Muhammad presented a written complaint to the District Magistrate in which he charged Mani Ram, Sub-Inspector of Police, with beating his servant Abdullah. The District Magistrate did not examine the complainant, but directed the Superintendent of Police to have Abdullah at once examined by a Medical Officer. This

⁽¹⁾ (1900) *I. L. R.* 27 *Cal.* 921.

⁽²⁾ (1899) 4 *Cal. W. N.* 305.

⁽³⁾ (1905) 9 *Cal. W. N.* 199.

⁽⁴⁾ (1903) *I. L. R.* 30 *Cal.* 923.

was done and the Civil Surgeon reported that Abdullah had a confusion on the top of the head and also on the inner surface of the thigh. By order, dated 20th April 1911, the District Magistrate sent this case for investigation under section 202 of the Criminal Procedure Code to the District Judge, a Magistrate of the 1st class.

Meantime on the 19th April the complainant, Ali Muhammad, had presented another written complaint to the District Magistrate in which he charged the said Sub-Inspector with having used abusive language towards him and having thereby committed an offence under section 504, Indian Penal Code. The complainant was thereupon examined by the District Magistrate, with reference to this complaint and incidentally also with reference to the earlier complaint, and on the 20th April 1911, the District Magistrate transferred this complaint to the said District Judge in his capacity of a Magistrate of the 1st class, for disposal. Thus both complaints came before the District Judge, but the Sessions Judge is in error in stating that they were both sent to that officer for inquiry. The first complaint was sent to him for that purpose, but the second complaint was transferred to him for trial and disposal. The complainant was not examined by the District Judge, but on the 21st and 22nd April he informed that officer that he had difficulty in getting his witnesses to come forward, and on the 26th April he stated that as the police had terrorised his witnesses, he was unable to go on with his case, which was, however, perfectly true.

On the same date the District Judge (acting, of course, in his Magisterial capacity) dismissed the complaint, which had been transferred to him for disposal (*i.e.* the charge against Mani Ram of having committed an offence under section 504, Indian Penal Code), and by a separate order reported to the District Magistrate that complainant declined to proceed with the complaint which had been referred for inquiry (*i.e.* the charge against Mani Ram of having caused hurt to Abdullah).

With reference to the latter report, the District Magistrate, by order dated 27th April 1911, directed notice to issue to complainant to show cause why he should not be prosecuted for an offence under section 211, Indian Penal Code, and fixed the 1st May for the date of hearing. On the 2nd May the District Magistrate dismissed the complaint

under section 203, Criminal Procedure Code, and by separate order of the same date granted sanction to Mani Ram to prosecute complainant for an offence under section 211, Indian Penal Code. In this last order, the District Magistrate also sanctioned the prosecution of complainant in respect of the complaint which charged Mani Ram with an offence under section 504, Indian Penal Code, and (as I have shown) had been disposed of by the District Judge. The learned Sessions Judge has unfortunately overlooked the distinction between the two cases and in his judgment assumes that both complaints were dismissed, under section 203, Criminal Procedure Code, by the District Magistrate. He holds, therefore, that the District Magistrate was competent to grant sanction for prosecution in both cases. This error is serious as it is an established proposition that a Magistrate of the 1st class is not subordinate to the District Magistrate for the purposes of section 195, Criminal Procedure Code—see No. 7 P. R. (Cr.) 1902, (*Mela Ram v. Emperor*) (1) and consequently in the present case the District Magistrate had no jurisdiction to sanction the prosecution of complainant in respect of the complaint which had been finally disposed of by the District Judge, *viz.*, the complaint which charged Mani Ram with an offence under section 504, Indian Penal Code. As regards this sanction, therefore, I must hold upon the authority cited that it was granted without jurisdiction and must, accordingly, be set aside as a mere nullity.

There remains the sanction in respect of the complaint which charged Mani Ram with having caused hurt to Abdullah. This complaint was referred to the District Judge, merely for inquiry under section 202, Criminal Procedure Code, and the District Magistrate was therefore competent, upon the submission of a valid report, to grant sanction for complainant's prosecution. But here again, I find, there were many serious irregularities in procedure. In the first place section 202, Criminal Procedure Code, does not apparently contemplate the subordination of a Magistrate of the 1st class to the District Magistrate. They are both Magistrates of the 1st class and it would seem that the District Magistrate, as such Magistrate of the 1st class, is not competent to direct another Magistrate of the 1st class to make inquiry under that section. This, however, is a minor point and I do not lay any stress upon it, or indeed give any final decision thereon. What, however, is of importance is that upon *this* complaint the

complainant was never examined either by the District Magistrate or by the District Judge. It is true that when the complainant was examined with reference to his other complaint, he made certain statements with reference to this charge also, but that was only incidentally and the procedure adopted did not, in my opinion, comply with the provisions of sections 202—203 of the Criminal Procedure Code. The complainant should have been specifically examined in respect of this complaint, and in the absence of any such examination, his complaint could not in law be dismissed (see *Haladhar Bhumi v. Sub-Inspector Police* (1) and *Lokenath Patra v. Sanyasi Charan Manna* (2). Furthermore, it has been held that unless a complaint is duly examined, inquiry and report under section 202, Criminal Procedure Code, cannot be called for, and if made, are made without jurisdiction and cannot form the basis of any further action (*Mahadeo v. Queen-Empress* (3) and *Budh Nath Mahato v. Empress*) (4). Upon this view of the case, the District Magistrate was incompetent to take action either under section 476 or section 195, Criminal Procedure Code. But I note also that the District Magistrate by his order, dated 27th April 1911, called upon the complainant to show cause why he should not be prosecuted, though at the time when that order was passed, the complaint had not been dismissed, and indeed was not dismissed till some days later. Obviously notice calling upon a complainant to show cause why he should not be prosecuted for preferring a false charge ought not to issue until it has been finally decided that the complaint must be dismissed as false (*cf. Queen-Empress v. Sham Lal*) (5).

Then, again, there is nothing on the record to show that Mani Ram's application for sanction to prosecute, though, dated 2nd May 1911, came before the District Magistrate prior to the 3rd May, that being the date which the District Magistrate's endorsement bears. Sanction, nevertheless, was accorded on the 2nd May in other words, at a time when (so far as the record shows) there was no application for sanction before the District Magistrate.

In view of the irregularities to which I have referred and of the fact that the sanction has been avowedly granted in order to enable the police to clear themselves of a charge which has admittedly failed and cannot, therefore, affect their reputation.

(1) (1905) 9 Cal. W. N. 199.

(2) (1903) I. L. R. 30 Cal. 923.

(3) (1900) I. L. R. 27 Cal. 921.

(4) (1899) 4 Cal. W. N. 305.

(5) (1887) I. L. R. 14 Cal. 707 (F. B.).

I am of opinion that sanction in this case should also be revoked. In cases of this kind, where imputations are made against influential police officers, a District Magistrate would be well advised in retaining the case in his own hands, if practicable, and in adhering to the procedure prescribed by law with more than ordinary strictness. The complainant himself should be examined without delay and he should be required to produce his witnesses at the earliest possible opportunity. Failure to act promptly may render it difficult, if not indeed impossible, for a complainant to induce his witnesses to come forward, and this, too, though the police may have done nothing to impede the complainant. It is unfortunately a fact that witnesses are unwilling to give evidence when they imagine, rightly or wrongly, that their statements, if hostile to the police, will not be forgotten, and in such cases the only hope that the complainant can have of getting them to come forward is if his complaint is taken up by a superior Magistrate and his witnesses sent for before they have been tampered with or have had time to reflect upon the possible danger of supporting complainant's story.

For the reasons given, I accept this petition and revoke the sanctions given by the District Magistrate in his order, dated 2nd May 1911.

Revision accepted.

No. 3.

Before Hon. Mr. Justice Shah Din.

CROWN

Versus

QADIR BAKHSH—ACCUSED,

Criminal Revision No. 1452 of 1911.

Cantonment Code, 1899, sections 94, 104—Notice requiring owner to repair or demolish houses—illegality of such notice.

Petitioner was convicted of not complying with a notice issued by the Lahore Cantonment authority under section 94 of the Cantonment Code. The notice required him "to repair or demolish his houses and level the site within fifteen days."

Held, reversing the conviction, that the notice was illegal inasmuch as it did not state the precise nature and extent of the repairs which in the opinion of the Cantonment authority he should execute in the interests of the safety of the occupier or of the public, as required by section 94 of the Cantonment Code.

23 P. R. (Cr.) 1905 (*Petman v. King-Emperor*) (1) cited.

Case reported by S. Wilberforce, Esquire, Sessions Judge, Lahore Division, with his No. 1201 of 1st November 1911.

Nemo, for Crown.

Fazl-i-Husain, for accused.

The facts of this case are as follows :—

By an order, dated 30th November 1910, a notice purporting to be under section 94 of the Cantonment Act was issued to M. Qadir Bakhsh, Tahsildar of Batala, owner of houses Nos. 85, 86, 87, 88, 89, 90, 91, 120, 121 and 396, situated in the Lahore Cantonments, requiring him to repair or demolish those houses and level the site within fifteen days, they being reported to be in a ruinous condition.

The accused on conviction by Major W. T. Barry, Cantonment Magistrate, Lahore, exercising the powers of a Magistrate of the 1st class in the Lahore District, was sentenced, by order dated 10th May 1911, under sections 94-104 of the Indian Penal Code, to a fine of Rs. 15 for non-compliance with the order.

Note.—Fine realised.

The proceedings are forwarded for revision on the following grounds :—

(1) The Cantonment Magistrate did not issue his order on the grounds that the condition of the houses constituted a public danger. The notice therefore under section 94 of the Cantonment Code was legally invalid. *Vide 1 P. R. (Cr.) 1906 (Wazirullah v. Crown) (1).*

(2) The prosecution was not instituted for over three months as required by section 284 of the Cantonment Code.

For these reasons I recommend that the conviction be quashed.

The order of the learned Judge was as follows :—

9th Dec. 1911.

SHAH DIN, J.—After hearing Mr. Fazl-i-Husain who appears in support of the recommendation made by the Sessions Judge under section 438, Criminal Procedure Code, for the reversal of the sentence passed by the Magistrate on M. Qadir Bakhsh, I think that the conviction of the accused in this case is illegal and must be set aside. Section 94 of the Cantonment Code, 1899, as amended, under which the Secretary of the

Lahore Cantonment Committee issued notice to the accused on the 30th November 1910, runs as follows :—

“Where any building * * * * is in the opinion of
 “the Cantonment authority in a ruinous state
 “* * * * the Cantonment authority may,
 “by notice in writing, require the owner or
 “occupier thereof forthwith either to remove the
 “same, or to cause such repairs to be made as it
 “may think necessary for the safety of the occupier
 “or of the public * * * *.”

The words of the section which I have underlined shew that in the notice, which the Cantonment authority issues to the owner or occupier of the building alleged to be in a ruinous state, the Cantonment authority has to state the nature of the repairs to be made by the owner or occupier which it may think necessary for the safety of the occupier or of the public as the case may be. As laid down in No. 23 P. R. (Cr.) 1905 (*Petman v. King-Emperor*) (1), a notice under section 94 of the Cantonment Code must give the owner the option of removing a building or making adequate repairs; and in regard to the option of making repairs the section contemplates that the owner should know the precise nature and extent of the repairs, which in the opinion of the Cantonment authority he should execute in the interests of the safety of the occupier or of the public.

The notice, dated the 30th November 1910, which was issued to the accused in this case was as follows:—“It having
 “been reported to the Cantonment authority that your houses
 “(of which the numbers are given in the heading of the notice)
 “are in a ruinous condition, I am directed to request you
 “within fifteen days of the service of this notice to repair
 “or demolish these houses and level the site.”

In the above notice it is not stated at all what kind of repairs the Cantonment authority required the owner to make to the houses specified in the notice; and on this ground alone the notice was in my opinion, illegal. That being the case, the accused was not liable to be prosecuted under section 104 of the Cantonment Code, and his conviction is bad in law. I therefore set aside the conviction and the sentence and direct that the fine if realised be refunded.

Revision allowed.

No. 4.

Before Hon. Mr. Justice Johnstone.

DEWAT SINGH AND OTHERS—PETITIONERS,

Versus

CROWN—RESPONDENT.

Criminal Revision No. 1421 of 1911.

Criminal Procedure Code, Act V of 1908, section 107—security to keep peace—persons not likely to commit breach of peace themselves, but likely to incite their partisans to do so.

Held, that a finding in regard to certain persons, that they are not likely themselves to commit a breach of the peace but may very likely incite their partisans so to do, does not warrant taking security under section 107, Criminal Procedure Code, from such persons.

64 P. R. (Cr.) 1887 (*Empress v. Badhawa Singh*) (1), and *Ram Coomar Banerjee v. Raja Gopal Singh Deb* (2), referred to.

Petition for revision under section 439 of the Criminal Procedure Code of the order of Lala Murari Lal, Magistrate, First Class, Ambala, dated 20th April 1911.

Sundar Das, for petitioners.

Nemo, for respondent.

The judgment of the learned Judge was as follows :—

6th Jan'y. 1912.

JOHNSTONE, J.—In this case 18 persons have been bound over to keep the peace. There are factions in the place, and as regards the first 16 in the list there was no doubt reason to suspect them of an intention to break the peace. Accused 17 and 18 are *baniyas* and the finding is that they are not likely themselves to commit any breach of the peace, but may very likely egg on their partisans among the other 16 so to do. In my opinion such a finding does not warrant the taking of peace security under section 107, Criminal Procedure Code—64 P. R. (Cr.) 1887 (*Empress v. Budhawa Singh*) (1), is in point, and *Ram Coomar Banerjee v. Raja Gopal Singh Deb* (2), even more directly so. In the latter case it was laid down that security should not be taken from a person under section 107, Criminal Procedure Code, in order to prevent him from inducing another person to break the peace.

For these reasons, I cancel the order for security as regards petitioners Dewat Singh and Basant Singh, accused 17 and 18

Petition accepted.

No. 5.

Before Hon. Mr. Justice Chevis.

HAR LAL AND OTHERS—(CONVICTS)—PETITIONERS

Versus

THE CROWN THROUGH ALI AHMAD—(COMPLAINANT)—
RESPONDENT.

Criminal Revision No. 1676 of 1911.

*Workmen's Liability Act, XIII of 1859—Summary trial, not admissible—
order for imprisonment in default—when to be made.*

Held, that cases under Act XIII of 1859 cannot be tried summarily.

Held also, that the procedure laid down in sections 2 and 3 of the Act must be carefully followed, and order for imprisonment in default can only be made *after* the labourer has failed to comply with the order calling on him to refund the money or get the work performed, as the case may be.

Emperor v. Dhondu (1), followed.

*Case reported by M. L. Waring, Esquire, I.C.S., Sessions Judge,
Delhi Division, with his No. 1256 of 23rd November 1911.*

Nemo, for petitioners.

Respondent, in person.

The facts of this case are as follows :—

The complainant employed the accused to cart 50,000 feet *bajri* in the Bengal camp and advanced Rs. 435. The accused failed to cart the *bajri* except 1,000 feet.

The accused on conviction by Mr. F. L. Brayne, exercising the powers of a Magistrate of the 1st class in the Delhi District were sentenced, by order, dated the 7th October 1911, under section 2, Act XIII of 1859, to repay Rs. 325 within three weeks, or in default to undergo three weeks' rigorous imprisonment.

The proceedings are forwarded for revision on the following grounds :—

This was a case under section 2 of Act XIII of 1859. It was tried summarily and petitioners were ordered to pay Rs. 325 within three weeks or in default to go to jail for three weeks.

The first ground of revision is that the summary trial was illegal. *Emperor v. Dhondu* (1) is quoted in support of the proposition that an offence under the Workman's Breach of Contract Act, 1859, cannot be tried summarily. This ruling is based upon the view that the proceedings of a Magistrate under sections 1 and 2 of Act XIII of 1859 "up to and inclusive" of the passing by him of an order for either the repayment

“ of the advance or performance of the contract do not constitute a trial for any offence as defined in the Criminal Procedure Code.” I have not been referred to any Chief Court ruling on the point, but the reasoning of the Bombay High Court appears to be unimpeachable. I forward the case to the Chief Court with a recommendation that the Magistrate’s order be set aside and the proceedings quashed.

The order of the learned Judge was as follows :—

17th Feby. 1912.

CHEVIS, J.—This is a case under Act XIII of 1859. The Magistrate has tried the case summarily, and passed an order directing the workmen to make repayment of the money advanced within three weeks or in default to undergo three weeks’ rigorous imprisonment. In the first place a case of this sort is not triable summarily, as is pointed out by the learned Sessions Judge. *Emperor v. Dhondu* (1) is a clear authority on this point.

In the next place, the order of the Magistrate is wrong, in that the order for imprisonment in default can only be made *after* the labourer has failed to comply with the order calling on him to refund the money or get the work performed as the case may be. The Magistrate should in such cases carefully follow the procedure laid down in sections 2 and 3 of the Act.

I set aside the proceedings and return the case for proceedings to be taken *de novo*.

Revision accepted.

No. 6.

Before Hon. Mr. Justice Robertson and Hon. Mr. Justice Rattigan.

MR. ALEXANDER RUFFE—(CONVICT)—APPELLANT
Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 635 of 1911.

Criminal Procedure Code, sections 454 and 460—trial of “ European British subject ” or “ European ” where no claim for trial as such is made before Sessions Judge.

Held, that where an European British subject or European makes no claim before the Sessions Judge to whom he has been committed for trial, to the privilege allowed to him under sections 454 and 460, Criminal Procedure Code, respectively, no objection to his trial with the aid of Indian Assessors can be entertained in the Chief Court on appeal.

Appeal from the order of H. A. Rose, Esquire, Sessions Judge, Ludhiana Division, dated the 21st August 1911.

Bevan Petman, for appellant.

Nemo, for respondent.

The judgment of the Court was delivered by—

RATTIGAN, J.—The appellant, Alexander Ruffe, has been 22nd Feby. 1912. convicted by the Sessions Judge, Ludhiana Division, agreeing with the Assessors, of having, in the early morning of the 13th June 1911, attempted to murder his wife, the complainant (described as L. Newman P. W. 2) by cutting her neck with a knife, and he has been sentenced, under section 307, Indian Penal Code, part (2), to rigorous imprisonment for 10 (ten) years. From this sentence he has appealed to this Court and his learned counsel, Mr. B. Bevan Petman, has appeared before us on his behalf. The appellant has also independently filed a most voluminous memorandum of appeal on his own account. As this memorandum is in the main unintelligible and where intelligible, irrelevant, we need say no more about it.

Mr. Bevan Petman's preliminary objection is that the trial of the appellant by the Sessions Judge, with the aid of 3 (three) Indian Assessors is bad inasmuch as (1) the appellant is an European British subject, or at all events (2) an "European" within the meaning of section 460, Criminal Procedure Code. We are unable to accede to the learned counsel's argument. It is true that the appellant did prefer a claim before the committing Magistrate, Mr. Swift to be tried as an European British subject, but it is equally clear from his written statement, filed in support of that claim, that he is not an European British subject as defined in section 4 (i) of the Criminal Procedure Code. His father was an Indian subject of His Majesty and the mere fact that appellant was born at Constantinople does not make him "an European British subject." There is no evidence on the record to show that he or his father or grandfather was domiciled in the United Kingdom or in any of the European, American, or Australian Colonies or Possessions of His Majesty or in the Colony of New Zealand or in the Colony of the Cape of Good Hope or Natal.

We are, therefore, of opinion that his claim to be tried as an European British subject was rightly rejected by the committing Magistrate. But quite apart from this objection it is apparent from the record that the appellant did not make this claim before the Sessions Judge to whose Court he was

committed, and consequently he must in any event be held to have relinquished his alleged right to be dealt with as such subject (section 454 (1) of the Criminal Procedure Code).

It is next urged that the appellant was at least "an European" and that his trial should in consequence have been held in accordance with the provisions of section 460 of the Code. Conceding, for the sake of argument, that the appellant is an European, we find that he made no claim under that section, as he was bound to do if he wished to avail himself of its provisions. We accordingly overrule these preliminary objections and proceed to deal with the appeal upon the merits.

[The remainder of the judgment is not required for the purpose of this report.]

No. 7.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Chevis.

WADHAWA SINGH AND 8 OTHERS—(ACCUSED)—
APPELLANTS

Versus

THE CROWN—RESPONDENT.

Criminal Appeal No. 744 of 1911.

Criminal Procedure Code, section 403 (4) and section 213—trial for another offence, constituted by the same acts, of a person who has been acquitted by a Magistrate, not competent to try such offence—validity of order of commitment to Court of Sessions made in pursuance of order of Sessions Judge.

Held, that under the provisions of section 403 (4), Criminal Procedure Code, a person who has been acquitted by a Magistrate of offences under sections 325, 326 and 148, Penal Code, may be tried subsequently for an offence under section 302, the Magistrate not being competent to try the latter offence.

Held also, that an order of commitment to the Court of Sessions is none the less valid because it was made in pursuance of an order by the Sessions Judge.

Emperor v. Zuje (1), followed.

Bajnath Pandey v. Gauri Kanta Mandal (2), distinguished.

Appeal from the order of S. Wilberforce, Esquire, Sessions Judge, Lahore Division, dated the 7th November 1911.

Beechey, for appellants.

Government Advocate, for respondent.

The judgment of the Court was delivered by—

SHAH DIN, J.

* * * * *

9th April 1912.

The fifteen appellants in these 7 appeals have been convicted by the Sessions Judge of Lahore of the offence of murder under section 302, read with section 149, Indian Penal Code, and they have all been sentenced to transportation for life. Hakim Singh, son of Sher Singh, who was also tried and convicted along with these appellants, has since died in Jail.

* * * * *

The case was challaned by the police under sections 325, 326 and 148, Indian Penal Code, there being at that time altogether fifteen accused persons, including the deceased Hakim Singh. Atar Singh *alias* Dhannu was then absconding. The Magistrate Lala Labhu Ram, who decided the case, acquitted Jawala Singh and Buta Singh and convicted the rest, some under sections 326 and 148, Indian Penal Code, and others under sections 325 and 148, Indian Penal Code, and sentenced them to various terms of imprisonment. This was on the 31st January 1911. On an appeal being preferred by the convicts to the Court of Session, the learned Sessions Judge by order dated the 19th May 1911 quashed the convictions and directed under section 423 (1) (b) of the Criminal Procedure Code that all accused persons, including Buta and Jawala who had been acquitted by the Magistrate, be committed for trial by the Court of Session. As regards the last named accused action was taken by the learned Judge under section 403 (4), Criminal Procedure Code, and commitment was ordered, on the ground that the offence committed by them was *prima facie* one of murder and that the Magistrate, who had tried them, was not competent to try that offence. In pursuance of the order of the Sessions Judge, the appellants now before us were committed by another Magistrate, S. Sohan Singh, to the Court of Session to stand their trial for an offence under section 302, Indian Penal Code, and as a result they have all been convicted of that offence and sentenced to transportation for life.

The first contention advanced by Mr. Beechey, who appeared for the appellants in this appeal (No. 744), was that the order of the Sessions Judge directing the commitment of Buta and Jawala Singh, appellants, who had been acquitted by the Magistrate, Lala Labhu Ram, was illegal, and that the subsequent trial of these appellants in the Court of Session was one held without jurisdiction. We do not see our way to accept this contention. In our opinion the subsequent trial of Buta and Jawala Singh for the offence of murder was justified under

sub-section (4) of section 403 of the Criminal Procedure Code, notwithstanding the fact that they had been acquitted by the Magistrate of offences under sections 325, 326 and 148, Indian Penal Code, inasmuch as, although the subsequent offence with which they were charged was constituted by the same acts which, according to the Magistrate's finding, constituted the offences of which they had been acquitted by him, the Magistrate was not competent to try the offence of murder with which they were subsequently charged. The trial of these persons in the Court of Session took place after a valid order of commitment made under section 213, Criminal Procedure Code, and the said order was none the less valid because it was made in pursuance of a direction given by the Sessions Judge. We are fortified in our opinion by a decision of the Bombay High Court reported as *Emperor v. Zuje* (1), which is a case very similar to the present one. The ruling of the Calcutta High Court in *Baijnath Pandey v. Gauri Kanta Mandal* (2), which was relied upon by Mr. Beechey, has reference to section 436, Criminal Procedure Code, which relates to the power of a Sessions Judge to order commitment of an accused person in a case in which he has been improperly discharged by an inferior Court. It has no bearing on the point before us in this case, which is one covered by section 403 (4) of the Code, as the order by the Magistrate which we are considering was one of acquittal and not one of discharge. We accordingly hold that the trial of Buta and Jawala Singh in the Court of Session was one held with jurisdiction, and we overrule to first contention urged by Mr. Beechey.

[The remainder of the judgment is not required for the purpose of this report.]

No. 8.

Before Hon. Mr. Justice Shah Din and Hon. Mr. Justice Scott-Smith.

CROWN—PETITIONER

Versus

FATEH ALI—(ACCUSED)—RESPONDENT.

Criminal Revision No. 60 of 1912.

Indian Penal Code, section 180—witness refusing to thumb mark his deposition—Civil Procedure Code, Act V of 1908, order XVIII, rule 5 and sections 151 and 122—Chief Court Circular orders—correction slip No. 61 of 29th August 1904.

Held, that a witness in a Civil case is not bound to sign or affix his thumb mark to the record of his deposition (*vide* order XVIII, rule 5, Civil

(1) (1905) 5 B. L. R. 125.

(2) (1893) I. L. R. 20 Cal. 633.

Procedure Code, 1908) nor is the Court authorized under section 151 of the Code or by virtue of correction slip No. 61 of 29th August 1904 of the Circular Orders of the Chief Court to compel a witness to do so, and consequently the latter's refusal does not constitute an offence under section 180 of the Penal Code.

6 *Mad. High Court Report App. side XIV* (1), and *Imperatrix v. Sir Sapa* (2), referred to.

Case reported by *R. Sykes, Esquire, District Magistrate, Gujrat, with his No. 208 of 1911.*

The facts of this case are as follows :—

In a Civil case the accused was examined as a witness, when before the Civil Court he refused to affix his thumb impression to his deposition. The case was sent up by the Munsif and the accused was convicted.

The accused on conviction by Lala Bhagat Ram, exercising the powers of a Magistrate of the 1st class in the Gujrat District, was sentenced, by order, dated 24th October 1911, under section 180 of the Indian Penal Code, to pay a fine of Rs. 20 or undergo one month's simple imprisonment.

The proceedings are forwarded for revision on the following grounds :—

I submit the record to the Chief Court for orders.

It seems very doubtful, whether there is any legal necessity on a witness to sign his statement or put the thumbmark to it in a Civil case.

5th December 1911.

Note.—The fine Rs. 20 has been paid.

The order of the Chief Court was as follows :—

SCOTT-SMITH, J.—The point referred to the Division Bench 25th April 1912. is whether a witness in a Civil suit is bound, when called upon to do so by the presiding officer of the Court, to affix his thumbmark to the record of his deposition, and is liable to punishment under section 180, Indian Penal Code, for refusal to do so.

One Fateh Ali, a witness in a Civil case before Khan Muzaffur Khan, Munsif, 1st class, has been convicted under such circumstances and has been fined Rs. 20, and the case has been referred to this Court under section 438 of the Code of Criminal Procedure by the District Magistrate, who doubted whether a witness in a Civil case was legally bound to sign his statement.

There is no published ruling, which we are aware of, directly in point.

In *Imperatrix v. Sir Sapa* (1), it was held that an accused person, who refuses to sign a statement made at his trial in answer to questions put by the Court, commits no offence, punishable under section 180 of the Indian Penal Code.

In *VI Madras H. C. R. App. side XIV* (2), it was held that a witness could not be convicted of contempt of Court under section 163 of the Code of Criminal Procedure, then in force, for refusing to sign a deposition made by him in the course of a Revenue enquiry. The High Court held that the witness was not legally bound to sign his deposition.

The method of recording the evidence of witnesses in Civil cases is laid down in order XVIII, rule 5, of the Code of Civil Procedure, and is as follows:—

“The evidence.....of each witness shall be taken down in writing and when completed, shall be read over in the presence of the Judge and of the witness, and the Judge shall, if necessary, correct the same, and shall sign it.”

There is here a distinct provision that the Judge shall sign the deposition, but there is nothing about the witness signing it also.

Section 151 of the Civil Procedure Code deals with the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the powers of the Court. We hold that this section would not authorize a Judge to force a witness to sign his deposition, for such signature is neither necessary for the ends of justice nor to prevent abuse of the powers of the Court. All that is necessary for a Court to do in recording depositions is to follow the procedure laid down in the Code, a witness may no doubt be asked to sign or thumbmark his deposition, but it does not appear to us that he is legally bound to do so under the Code as it stands.

The Magistrate in his judgment has referred to section 122 of the Civil Procedure Code, which gives the Chief Court power after previous publication to make rules regulating its own procedure and that of Subordinate Courts, and so to alter or add to all or any of the rules in the First Schedule. The learned Government Advocate has not been able to urge that this Court has made any such rules relating to the matter in question which have the force of law. The Court has issued certain rules and orders which are contained in 3 volumes. Those in volume I were made under the authority of Acts of the Legis-

lature and have the force of law. Volume II contains instructions to Judicial Officers, and volume III contains Circular Orders (administrative control).

In volume III, section 33 (correction slip No. 61 of 29th August 1904) contains a list of documents and papers on which thumb and finger marks should be affixed. No. 4 in the list is "Statements by persons against their own interests". The deposition made by Fateh Ali is said to be one against his interest and therefore he was called upon to affix his thumb-mark to it in accordance with the above instructions of this Court.

Now in our opinion correction slip No. 61, above referred to, merely lays down the procedure to be followed by Courts in calling upon persons to thumbmark certain documents, but it has not the force of law and we are clear that there is no legal obligation upon persons to thumbmark such documents. Courts can doubtless ask them to do so, but if they refuse, they cannot be compelled to, and are not liable to prosecution for an offence under section 180, Indian Penal Code. We therefore set aside the conviction and sentence, and acquit Fateh Ali. The fine, if paid, will be refunded.

Revision accepted.

No. 9.

Before Hon. Mr. Justice Kensington.

IBRAHIM—(CONVICT)—APPELLANT

Versus

CROWN—RESPONDENT.

Criminal Appeal No. 249 of 1912.

Indian Arms Act, XI of 1878, sections 19 and 20—what constitutes offence under latter section.

Held, that section 20 of the Arms Act applies only to cases where the import or export of arms is attempted.

Crown v. Azu (1) and Ahmed Hossein v. Empress (2), followed.

Appeal from the order of A. J. W. Kitchin, Esquire, District Magistrate of Rawalpindi District, dated the 3rd day of April 1912.

Dhanraj Shah, for appellant.

Mul Chand, for respondent.

8th June 1912.

The judgment of the learned judge was as follows :—
KENSINGTON, J.—There are before me three separate appeals Nos. 249, 250 and 276 covering the cases of the three men convicted by the District Magistrate and sentenced as follows :—

Ibrahim (case No. 249) five years' imprisonment, Rajwali (case No. 250) three years' imprisonment and Said Rasul (case No. 276) seven years' imprisonment. Rajwali is a Mirasi, aged 30 and Said Rasul, an Awan, aged 24. Both these men were employed permanently in the Rawalpindi Arsenal. The third appellant Ibrahim, aged 30, is not shewn to have any immediate connection with the Arsenal.

It appears that between 1-30 P.M. of Saturday, the 14th October, and 8-30 A.M. of Monday, the 16th, 27 pistols were stolen from the Arsenal. There was for a long time no definite clue but on information received the police laid a trap with the result that on the 25th of February, 16 of these pistols were recovered from the house of Faqir Muhammad (witness 6) under circumstances strongly implicating the appellants Ibrahim and Said Rasul. Between the 27th and 29th of February four more pistols were recovered under circumstances further implicating the appellant Ibrahim and also connecting the appellant Rajwali with the case. It is stated that the remaining 7 pistols were subsequently discovered, but there is no evidence in the present case to shew when or how these 7 pistols were recovered, and it is understood that the appellants are not concerned with them.

The District Magistrate has somewhat strangely tried all three appellants jointly for offences under section 411, Indian Penal Code, and section 20 of the Indian Arms Act, XI of 1878. There was perhaps no objection to the joint trial of Ibrahim and Said Rasul in respect of the main seizure of the 16 pistols on the 25th February, but it is difficult to see how Rajwali at any rate could be included in the joint trial. There has, however been no objection on this account on behalf of the appellants and I do not think the matter of sufficient importance to justify me in ordering a fresh trial, as it does not appear that any of the appellants have been prejudiced by the form of the trial.

There is a further more serious irregularity in the District Magistrate's proceedings in that he has not definitely stated in his judgment the offence or offences of which the appellants are convicted. If it is to be assumed that they have all been convicted of both the offences with which they were charged, some explanation of the sentences should have been given and it

should have been specified whether these were awarded under section 20 of the Arms Act only or under that section together with section 411, Indian Penal Code, for which the maximum sentence is imprisonment for three years. I take it that section 20 of the Arms Act was added in order to admit of a heavier sentence than imprisonment for three years, but if this was the object, it would apparently have been better to charge Said Rasul at any rate in the alternative under section 380 or 381, Indian Penal Code, as his connection with the Arsenal leaves little doubt that he must have been one of the original thieves. †

The correctness of the application of section 20, Arms Act, to the case is open to very great doubt. That section is very widely worded in amplification of section 19, and in this particular case it has been applied to make the offence committed by the appellants under section 19 (f) (illegal possession of arms) more serious in so far as the intention was indicated of concealing these arms from the police. So far as I have been able to discover there are only two rulings bearing upon the meaning of section 20, namely that given by a Full Bench of the Judicial Commissioner's Court in Sind—*Crown v. Azu* (1) and the Calcutta High Court ruling in *Ahmed Hossain v. Empress* (2). In each of these cases it was held that section 20 should not be applied to ordinary cases of concealment of arms, and though the reasons have not been very clearly stated by the learned Judges, the conclusion appears to have been that section 20 directly applies only to cases where the import or export of arms is attempted. This appears to me a reasonable conclusion. There is otherwise no possibility of distinguishing ordinary cases of concealed arms under section 19 and of proving that the special intention was to conceal from the police. It is obvious that whenever arms are illegally possessed, and are concealed in order to hide the possession, section 20 would on a literal construction of the wording be applicable rather than section 19, but such is not the usual practice of the Courts and both the rulings quoted are distinctly against so wide a construction. I think that it should be held that section 20 is equally inapplicable in the present case and that none of the appellants can on the trial, as held, be given more than the maximum sentence permitted by section 411, Indian Penal Code.

[The remainder of the judgment is not required for the purposes of this report.]

(1) (1906) 9 Cr. L. J. 259 (F. B.).

(2) (1900) I. L. R. 27 Cal. 692.

No. 10.

*Before Hon. Sir Arthur Reid, Kt., Chief Judge and Hon.
Mr. Justice Rattigan.*

CROWN

Versus

WARYAM AND RALLA—(ACCUSED)—RESPONDENTS.

Criminal Revision No. 437 of 1912.

Criminal Procedure Code, sections 435, 436, 437 and 438—competency of Sessions Judge to report to Chief Court an order of a District Magistrate for further inquiry into the case of an accused person, discharged by an inferior Criminal Court.

Held, that the prohibition contained in section 435 (4) of the Code of Criminal Procedure, extends to all cases in which either a District Magistrate or a Sessions Judge has taken action or refused to take action under sections 435, 436, 437, or 438 of the Code, and that consequently a Sessions Judge is not competent under section 438 to report to the Chief Court the order of a District Magistrate ordering further inquiry by a subordinate Criminal Court into the case of an accused person, who has been discharged by that subordinate Criminal Court.

Kalimuthu v. Emperor (1) and *in re Karpurasundaram Pillai* (2), referred to.

Revision from the order of W. A. LeRossignol, Esquire, Sessions Judge, Hoshiarpur Division, dated the 6th March 1912.

Government Advocate for complainant.

Umar Bakhsh and Sohan Lal for accused.

The order of the Court was delivered by—

27th July 1912.

SIR ARTHUR REID, C. J.—The question for consideration is whether a Court of Sessions is empowered to report to this Court, under section 438 of the Code of Criminal Procedure, the order of a District Magistrate that further inquiry be held by an inferior Criminal Court into the case of an accused person who has been discharged by that inferior Criminal Court. Section 435 of the Code was amended in 1898 by the addition of sub-section (4). “If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.” The sub-section deals specially only with applications under section 435, and having regard to the language of section 438 (1) “on examining under section 435 or otherwise, the record of any proceedings,” it is at first sight possible that section 435 (4) does not apply to a report made by a Sessions Judge or District Magistrate on examining *suo motu* the record of any proceedings.

(1) (1902) *I. L. R.* 26 *Mad.* 477.

(2) (1906) 17 *Mad. L. J.* 153.

The question has been dealt with by the Madras High Court in *Kalimathu v. Emperor* (1) and in *re Karpurasundaram Pillai* (2). In the former case it was held that under the recently enacted section 435 (4) it is certainly not competent for the District Magistrate to entertain an application for commitment to be ordered when the Sessions Judge had refused such an order and that the question remained whether the District Magistrate could act *suo motu*. It was held that it could not have been intended that what the District Magistrate might not do on an application could yet be done by him by dispensing with an application; that the reason for the prohibition was the avoidance of a conflict between the orders of two District authorities having co-ordinate powers in the matter, that the reason applied equally to cases when they acted *suo motu*, and that to hold otherwise would be to render nugatory the salutary prohibition enacted. In the latter case it was held that a Sessions Judge could not entertain an application, the object of which was that he should call for the record of a case in which an application had been made to a District Magistrate under section 435 of the Code and refer the District Magistrate's order to the High Court, the prohibition contained in section 435 (4) being as applicable to such an application as to an application, the object of which was that the Sessions Judge should revise the order passed by the District Magistrate in revision.

The effect of these expositions of the law, in which we concur, is to extend the application of section 435 (4) to all cases in which either a District Magistrate or a Sessions Judge has taken action, or has refused to take action, under section 435 or 436 or 437 or 438, the object of the sub-section being, as stated by the Madras Court, the avoidance of a conflict between the orders of the District Magistrate and the Sessions Judge, and in our opinion the words "further application" in section 435 (4) mean any other application in respect of the order in question of the inferior Criminal Court.

For these reasons we answer the question referred to in the negative.

(1) (1902) *I. L. R.* 26 *Mad.* 477.

(2) (1906) 17 *Mad. L. J.* 153.



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C

CUSTOM (ALLUVION AND DILUVION).

Submerged occupancy holding—who entitled, on its recovery—agreement in Wajib-ul-arz, whether binding—Regulation XI of 1825—general rule.

Held, that an entry in a *Wajib-ul-arz*, which lays down that occupancy tenants lose the portion of their tenancy, which is submerged by a river and that it goes to the owners on recovery, who will reduce the rent *pro rata*, is not enforceable—(1) as being without consideration and (2) as being opposed to the provisions of Regulation XI of 1825.

Held also, following 8 P. R. (Rev.) 1901 (*Roshan v. Potho*) that in the absence of proof of a custom to the contrary, the general rule in the Punjab must prevail—*viz.*, that an occupancy tenant does not lose his right by reason of the land of his holding being submerged.

Held further, that strict proof should be required of any alleged custom contravening this general rule.

15 P. R. 1872 (*Rama v. Sher Singh*), referred to.

... **No. 4 P. R. (Rev.) 1912.**

L

LAMBARDARI.

(1) *Lambardari—succession to—adopted son or cousin.*

Held, that no hard and fast rule can be laid down in a conflict between an adopted son who is a distant agnatic kinsman of the deceased lambardar and a near collateral and that the whole circumstances of each particular case must be considered.

Held also, that the circumstances in this case entitled the adopted son to succeed in preference to the collateral (a first cousin of the deceased lambardar).

2 P. R. (Rev.) 1899 (*Barkat Ali v. Ilahi Bakhsh*), 9 P. R. (Rev.) 1892 (*Hira v. Wazira*), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*), 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*), 14 P. R. (Rev.) 1880 (*Hira Singh v. Jewan Singh*), 2 P. R. (Rev.) 1883 (*Nihal Singh v. Bhana*), 14 P. R. (Rev.) 1886 (*Manla Dad v. Hayat*), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh*) and 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*), referred to.

... .. No. 1 P. R. (Rev.) 1912.

Succession to lambardar who died sonless—rule of primogeniture not applicable to adopted sons—difference in lambardari rules under the Punjab Land Revenue Act of 1887 and those under the prior Act of 1871 pointed out.

Held, that rule 17 (ii) of the Lambardari Rules made under the Punjab Land Revenue Act of 1887, which lays down that succession shall go to the "nearest eligible heir according to the rule of primogeniture" must be strictly construed and has therefore no application to adopted sons.

Held, consequently, that the elder son of a collateral in the junior branch of the family has a preferential claim to his younger brother who was adopted into the elder branch, in the absence of proof of a special custom of succession in the latter's favour.

14 P. R. (Rev.) 1886 (*Manla Dad v. Hayat*), 9 P. R. (Rev.) 1892 (*Hira v. Wazira*), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*), 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh*), 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*), 97 P. R. 1879 (*Badhawa Singh v. Ganesha*), 9 P. R. (Rev.) 1880 (*Imam Bakhsh v. Kasu*), 84 P. R. 1887 (*Uttam Singh v. Wazir Singh*), 56 P. R. 1893 (*Fazla v. Ilam Din*), 43 P. R. 1895 (*F. B.*), (*Fattek Muhammad v. Mussammatt Jivan*), 18 P. R. 1903 (*Fattek Muhammad v. Nizam-ul-Din*), and 50 P. R. 1908 (*Ram Ditta v. Takht Mal*), referred to.

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M

MUTATION ENTRIES.

When to be made—what enquiry to be held.

See *Punjab Land Revenue Act*, (2).

... .. No. 5 P. R. (Rev.) 1912.

0

OCCUPANCY RIGHTS.

May be claimed under section 5 (1) (d), Tenancy Act, not only by *jagirdar* himself but also by his successors in interest.

See *Punjab Tenancy Act*, (1).

... .. No. 7 P. R. (Rev.) 1912.

P

PUNJAB LAND REVENUE ACT.

(1) SECTION 15 (1) (a).

Sanction to review—not an appealable order—Civil Procedure Code, section 2 (14).

Held, that a sanction (to review an order) given under section 15 (1) (a), Panjab Land Revenue Act, is not an “order” which is appealable under the Act.

... .. No. 3 P. R. (Rev.) 1912.

(2) SECTIONS 34 (4), 36 (1) AND 37 (a).

Mutation entries—what enquiry Revenue Officers should make before making such entries.

Held, that a record of rights is a record of titles and not a record of possession. If entries are agreed to by all the parties interested or are supported by a decree binding on those parties, possession may be disregarded. In other cases, *i.e.*, disputed cases, the facts as to possession are, under section 36, Revenue Act, relevant to the decision of the dispute, not for the purpose of making mutation follow possession but for the purpose of ascertaining whether facts “proved or admitted to have occurred” (section 37 (a)) justify a variation of the existing record of rights

7 P. R. (Rev.) 1895 (*Secretary of State v. Bhagwan Das*), followed.

1 P. R. (Rev.) 1891 (*Mian Khan v. Alam Khan*) dissented from.

Held also, that the enquiry to be made before passing orders in mutation proceedings should be of a summary character only.

1 P. R. (Rev.) 1901 (*Harnand v. Jamna*) and 14 P. R. (Rev.) 1901 (*Momanda v. Farid*), followed

Held, consequently that as in the present case the transfer had been made by a person of full age and possession had passed to the transferee, mutation should be made in favour of the latter, irrespective of Customary Law considerations as to the validity of the transfer.

The difference in the value of possession as evidence of title in cases of transfer and inheritance, respectively, pointed out.

... .. No. 5 P. R. (Rev.) 1912,

PUNJAB LAND REVENUE ACT—*concl'd.*

(3) Lambardari rule 17 (ii)—rule of primogeniture not applicable to adopted sons.

See *Lambardari*, (2).

... .. No. 2 P. R. (Rev.) 1912

PUNJAB TENANCY ACT.

(1) SECTION 5 (1) (d).

“Jagirdar” includes his successor in interest.

Held, that having regard to the definition of “tenant” given in section 4 (7) of the Tenancy Act of 1887, occupancy rights under section 5 (1) (d) are claimable, not only by the *jagirdar* himself but also by his successors in interest.

2 P. R. (Rev.) 1897 (*Gandu v. Ganpat Rai*), followed.

6 P. R. (Rev.) 1895 (*Ram Chand v. Umrao Singh*), referred to.

83 P. R. 1882 (*Bhola Singh v. Gopal*), 67 P. R. 1885 (*Habib Bakhsh v. Gulab*), and 148 P. R. 1888 (*Nand Ram v. Ahmad Shafi*), distinguished.

... .. No. 7 P. R. (Rev.) 1912.

(2) SECTION 48.

Power of Revenue Courts to grant relief against forfeiture for non-payment of rent to tenants under contract—Transfer of Property Act, 1882, section 114—Revision.

Held, that section 48 of the Tenancy Act does not debar Revenue Courts from granting relief against forfeiture for non-payment of rent, if under the general law governing lease-contracts such relief is claimable by the lessee

Held, consequently, that the relief allowable under section 114 of the Transfer of Property Act may be granted to a lessee whose lease has determined by forfeiture for non-payment of rent, the provisions of the section being in consonance with the principles of equity, good conscience and justice.

85 P. R. 1902 (*Mussammatt Bhagwan Devi v. Mussammatt Bunyadi Khanum*), referred to.

Held also, that the order of a Collector, who fails to consider this point, is open to revision inasmuch as he has failed to exercise a jurisdiction vested in him by law.

... .. No. 6 P. R. (Rev.) 1912.

R

REGULATION XI of 1825.

Validity of agreement opposed to provisions of—

See *Custom (Alluvion and Diluvion)*.

... .. No. 4 P. R. (Rev.) 1912.

T

TRANSFER OF PROPERTY ACT.

SECTION 114.

Applicable to agricultural leases in the Punjab.

See *Punjab Tenancy Act* (2).

... .. **No. 6 P. R. (Rev.) 1912.**

W

WAJIB-UL-AZZ.

Entry in—by which occupancy tenants lose submerged portions of their tenancy which goes on recovery to the landlord—not binding.

See *Custom (Alluvion and Diluvion)*.

... .. **No. 4 P. R. (Rev.) 1912.**

Financial Commissioner, Punjab.

REVENUE JUDGMENTS.

No. 1.

*Before Hon. Mr. A. Meredith, 2nd Financial
Commissioner.*

NURA—APPELLANT

Versus

NASIR DIN, *alias* NASIRA—RESPONDENT.

Revenue Appeal No. 101 of 1910-11.

Lambardari—succession to—adopted son or cousin.

Held, that no hard and fast rule can be laid down in a conflict between an adopted son, who is a distant agnate kinsman of the deceased lambardar, and a near collateral and that the whole circumstances of each particular case must be considered.

Held also, that the circumstances in this case entitled the adopted son to succeed in preference to the collateral (a first cousin of the deceased lambardar).

2 P. R. (Rev.) 1899 (*Barkat Ali v. Ilahi Bakhsh* (1), 9 P. R. (Rev.) 1892 (*Hira v. Wazira*) (2), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*) (3), 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*) (4), 14 P. R. (Rev.) 1880 (*Hira Singh v. Jivan Singh*) (5), 2 P. R. (Rev.) 1833 (*Nihal Singh v. Bhana*) (6), 14 P. R. (Rev.) 1886 (*Maula Dad v. Hayat*) (7), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh* (8) and 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*) (9) referred to.

*Appeal from the order of Lieut.-Col. C. M. Dallas, Commissioner,
Delhi Division, dated the 13th May 1911.*

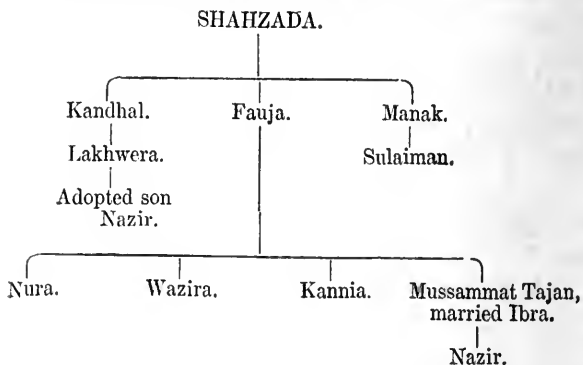
The order of the learned Financial Commissioner was as follows :—

MEREDITH, F. C.—Lakhwera, lambardar of Midh in the 13th Nov. 1911. Fatehabad Tahsil of the Hissar District, has died childless. There are two claimants for the vacant post, Nura his uncle's son, and Nasir, his uncle's daughter's son, who was adopted by him in 1903. Nasir is sister's son of Nura, and is also a distant collateral of the 10th or 12th degree.

(1) 2 P. R. (Rev.) 1899.
(2), (3) and (4) 9, 10 and 11 P. R.
(Rev.) 1892.
(5) 14 P. R. (Rev.) 1880.

(6) 2 P. R. (Rev.) 1883.
(7) 14 P. R. (Rev.) 1886.
(8) and (9) 12 and 13 P. R.
(Rev.) 1892.

The following pedigree tables show the relationship :—



The Collector appointed Nura who has acted as *sarbarah* of the lambardar for the last six years. The Commissioner reversed this order on appeal, on the ground that an adopted son ordinarily has all the rights and privileges of a real son. Neither Court referred to the previous decisions on this point of the succession of an adopted son to the post of lambardar, which were summed up in Sir Louis Tupper's judgment in the case *Barkat Ali v. Ilahi Bakhsh*, 2 P. R. (Rev.) 1899 (1). It was taken as settled that an adopted son being also a daughter's son is not entitled to succeed to the office of lambardar in the presence of new collaterals, if he is not of the same *got* as the deceased—9 P. R. (Rev.) 1892 (*Hira v. Wazira*) (2), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*) (3) and 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*) (4). In the present case the parties are Muhammadan Rajputs of the Chauhan *got*. It was also held to be decided that an adopted son, being a near agnate of the deceased lambardar and of the same *got* with him, is entitled to succeed if his succession is not opposed to custom or to the general feeling in the village in the matter—14 P. R. (Rev.) 1880 (*Hira Singh v. Jiwan Singh*) (5), 2 P. R. (Rev.) 1883 (*Nihal Singh v. Bhana*) (6), 14 P. R. (Rev.) 1886 (*Manla Dad v. Hayat*) (7), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh*) (8) and 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*) (9). There is no reference in the *Wajib-ul-arz* to any such custom and none such is alleged to exist. There is no feeling in the village about the matter at all. In the case whether an adopted son who is a distant agnatic kinsman of the deceased is entitled to exclude a collateral as near as a brother's son, Sir Louis Tupper was of opinion that it was not advisable to lay down any hard and fast rule as to the degree of relationship which would support or bar

(1) 2 P. R. (Rev.) 1899.
 (2), (3) and (4) 9, 10 and 11 P. R.
 (Rev.) 1892.
 (5) 14 P. R. (Rev.) 1880.

(6) 2 P. R. (Rev.) 1883.
 (7) 14 P. R. (Rev.) 1886.
 (8) and (9) 12 and 13 P. R.
 (Rev.) 1892.

the claim and that the whole circumstances of each particular case must be considered. In the present case Nasir is a distant agnatic relation of the deceased, he was adopted by him in 1903, since when he has been managing half his land. A registered agreement was executed on 19th March 1903 to this effect, Nura himself being a witness. He is the sister's son of Nura, and I agree with the Commissioner that he is entitled to succeed Lakhwera, his adopted father, as lambardar, in the presence of Nura, who is only the first cousin of the deceased.

Appeal rejected with costs.

No. 2.

Before Hon. Mr. M. W. Fenton, C.S.I., 2nd Financial Commissioner.

BHAG SINGH—PETITIONER

Versus

JAURA SINGH—RESPONDENT.

Revenue Revision No. 71 of 1911-12.

Lambardari—succession to lambardar who died sonless—rule of primogeniture not applicable to adopted sons—difference in lambardari rules under the Punjab Land Revenue Act of 1887 and those under the prior Act of 1871 pointed out.

Held, that rule 17 (ii) of the Lambardari Rules made under the Punjab Land Revenue Act of 1887, which lays down that succession shall go to the "nearest eligible heir according to the rule of primogeniture" must be strictly construed and has therefore no application to adopted sons.

Held, consequently, that the elder son of a collateral in the junior branch of the family has a preferential claim to his younger brother who was adopted into the elder branch, in the absence of proof of a special custom of succession in the latter's favour.

14 P. R. (Rev.) 1886 (*Maula Dad v. Hayat*) (1), 9 P. R. (Rev.) 1892 (*Hira v. Wazira*) (2), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*) (3), 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*) (4), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh*) (5), 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*) (6), 97 P. R. 1879 (*Badhawa Singh v. Ganesha*) (7), 9 P. R. (Rev.) 1880 (*Imam Bakhsh v. Kasu*) (8), 84 P. R. 1887 (*Uttam Singh v. Wazir Singh*) (9), 56 P. R. 1893 (*Fazla v. Ilam Din*) (10), 43 P. R. 1895 (F. B.), (*Fatteh Muhammad v. Mussamat Jiwan*) (11), 18 P. R. 1900 (*Fatteh Muhammad v. Nizam-ud-Din*) (12), and 50 P. R. 1908 (*Ram Ditta v. Takht Mal*) (13), referred to.

Petition for revision of the order of R. Sykes, Esquire, Commissioner of Jullundur, dated the 16th October 1911.

Both parties represented.

- (1) 14 P. R. (Rev.) 1886.
- (2) 9 P. R. (Rev.) 1892.
- (3) 10 P. R. (Rev.) 1892.
- (4) 11 P. R. (Rev.) 1892.
- (5) 12 P. R. (Rev.) 1892.
- (6) 13 P. R. (Rev.) 1892.

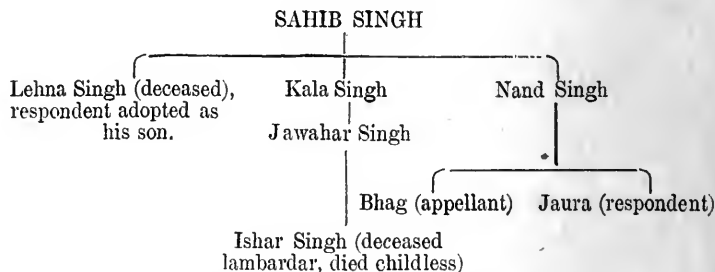
- (7) 97 P. R. 1879.
- (8) 9 P. R. (Rev.) 1880.
- (9) 84 P. R. 1887.
- (10) 56 P. R. 1893.
- (11) 43 P. R. 1895 (F. B.).
- (12) 18 P. R. 1900.

(13) 50 P. R. 1908.

The order of the learned Financial Commissioner was as follows :—

29th March 1912.

FENTON, F. C.—This is a question of succession to a lambardarship. The following pedigree-table shows the position of the claimants.



It is unnecessary to investigate the question as to how the lambardarship came to Kala Singh's branch of the family, Lehna Singh being passed over. It is not seriously contended that if Lehna Singh were now alive he would still be liable to supersession, or that if the respondent were real son and not merely adopted son of Lehna Singh, he would not be the heir entitled to succeed according to the custom of primogeniture. The whole question in the case is, whether the fact of Jaura, the respondent, being an adopted son impairs his claim based on heirship by primogeniture through his adoptive father.

The wording of rule 17 (ii) of the rules under the Land Revenue Act is important, and it is important to notice the difference between this wording and that of rule A. I. 4 of the rules under the Land Revenue Act, 1871, which governed the appointment of headmen prior to 1887. Under the rules in force before 1887 the person who, subject to certain considerations which for present purpose are irrelevant, was to be appointed lambardar was "the heir who, *according to the custom of the village*, may have the first claim to succeed." Under the rule which is now in force "the nearest eligible heir *according to the rule of primogeniture* shall be appointed unless "some special custom of succession to the office be distinctly "proved." There is no mention of any special custom of succession to the office in the present case, and as remarked by Mr. Steedman in the case reported as No. 9 P. R. (Rev.) of 1892 (*Hira v. Wazira*) (1), it is difficult to see how a custom properly so called can have arisen in regard to the appointment of a successor to an office which dates only from annexation and appointments to which are made by the Collector.

The importance which, as I have said above, attaches to the difference between the wording of the rules of succession prior to and after the year 1887 arises from the circumstance that the rulings under which adopted sons have in the past sometimes successfully maintained their claims to succeed to the post of lambardar are all referable to the leading case No. 14 P. R. (Rev.) of 1886 (*Maula Dad v. Hayat*) (1), a ruling given when the Act of 1871 was in force. In the series of rulings which are published as 9 P. R. (Rev.) 1892 (*Hira v. Wazira*) (2), 10 P. R. (Rev.) 1892 (*Sher Singh v. Subha*) (3), 11 P. R. (Rev.) 1892 (*Suchet Singh v. Basant Singh*) (4), 12 P. R. (Rev.) 1892 (*Shah Muhammad v. Diwan Bakhsh*) (5), 13 P. R. (Rev.) 1892 (*Ramjas v. Nihala*) (6), it has been laid down that while an adopted son who is of a different *got* from his adoptive father is not entitled to succeed his adoptive father in the office of village headman, an adopted son who, being an agnate, is of the same *got* is, in accordance with the ruling 14 P. R. (Rev.) of 1886 (*Maula Dad v. Hayat*) (1), entitled to succeed. In none of these rulings of 1892 is there any reference to the fact that since the date of 14 P. R. (Rev.) of 1886 (*Maula Dad v. Hayat*) (1), the law of succession to the office of lambardar had been altered. There is no allegation in the present case of any special custom of succession to the office of lambardar. In fact the respondent no less than the appellant claims to succeed by virtue of the rule of primogeniture. The question then for decision in this case is whether the rule of primogeniture embraces descent by adoption as well as descent by birth. According to the etymology of the word 'primogeniture' the adoptive tie is not connoted. It is true that section 2 (19) of the General Clauses Act, 1868, provided that the word "son" should include an adopted son in all Acts made between 1868 and 1897 (when the present General Clauses Act came into force), but we have not got the word "son" in the Land Revenue rule which we are now considering and, moreover, the General Clauses Act of 1868 did not apply to rules. There is ample warrant for applying strict canons of interpretation for the determination of the meaning of the expression "rule of primogeniture." In a somewhat analogous case under section 59 of the Tenancy Act, the Chief Court held No. 43 P. R. of 1895 (*Fatteh Muhammad v. Mussammat Jivan*) (7), that an heir appointed by any of the customary methods

(1) 14 P. R. (Rev.) 1886.

(2) 9 P. R. (Rev.) 1892.

(3) 10 P. R. (Rev.) 1892.

(4) 11 P. R. (Rev.) 1892.

(5) 12 P. R. (Rev.) 1892.

(6) 13 P. R. (Rev.) 1899.

(7) 43 P. R. 1895.

recognised among owners of land in the Punjab cannot be regarded as a "male lineal descendant in the male line of the "descent" within the meaning of that section. Applying a similarly strict principle of interpretation to the present case I am unable to hold that in the case of a vacancy in the office of a headman an adopted son can succeed to or through his father under any rule of primogeniture. In coming to this conclusion I have not sought for any customary interpretation of the meaning of the word 'primogeniture' in connection with the adoptive relationship as it is very unlikely that there is any village custom on the subject, but it is not irrelevant to observe that where, as in the case of the Phulkian States, primogeniture was the custom of succession to the chiefship, the right of adoption did not confer on the person adopted a claim to inherit the chiefship. In fact, succession to a chiefship did not in any case go to an adopted son (*Inheritance to Chiefships*, by Sir Lepel Griffin, page 49), a precedent which justifies the view that succession to an office does not necessarily follow the rules of family inheritance.

Lastly the position of the respondent Jaura in the present case is affected by the circumstance that the vacant lambardarship was not held by his adoptive father. The general custom of the Punjab appears to be that an adopted son succeeds only lineally, that is to say, to his adoptive father only, and does not succeed to his adoptive father's relations collaterally—*vide* 97 P. R. 1879 (*Badhawa Singh v. Ganesha*) (1), 9 P. R. (Rev.) 1880 (*Imam Bakhsh v. Kasu*) (2), 56 P. R. 1893 (*Fazla v. Ilam Din*) (3), 84 P. R. 1887 (*Uttam Singh v. Wazir Singh*) (4), 18 P. R. 1900 (*Fattek Muhammad v. Nizam-ul-Din*) (5), and 50 P. R. 1908 (*Ram Ditta v. Takht Mal*) (6), and many others. Under these rulings Jaura, *qua* adopted son of Lehna Singh, could not succeed to the estate of the deceased lambardar. *A fortiori*, he could not succeed to his lambardarship. In conclusion I desire to note that from the point of view of expediency there are good grounds for refusing to treat adoption as giving a claim to the office of headman, as observed by Mr. Steedman (page 23, Revenue Rulings, *Punjab Record* of 1892) "adoptions are very often made to spite the heirs. I do not think that a lambardar should be able to "gratify private spite by imposing a lambardar on the village "whom the villagers must dislike."

(1) 97 P. R. 1879.
 (2) 9 P. R. (Rev.) 1880.
 (3) 56 P. R. 1893.

(4) 84 P. R. 1887.
 (5) 18 P. R. 1900.
 (6) 50 P. R. 1908

The appellant Bhag has for many years acted as *sarbarah* of the deceased lambardar, and it is anomalous that his title to succeed to the office should be postponed to that of a younger brother in consequence of the act of a third party.

For the foregoing reasons I now, under section 16 (4) of the Land Revenue Act, direct that Bhag be appointed lambardar in place of the respondent Jaura.

Revision accepted.

No. 3.

Before Hon. Mr. M. W. Fenton, Financial Commissioner.

AHMAD—APPELLANT

Versus

AHMAD—RESPONDENT.

Revenue Appeal No. 4 of 1911-12.

Punjab Land Revenue Act, XVII of 1887, section 15 (1) (a)—Sanction to review—not an order, appealable—Civil Procedure Code, section 2 (14).

Held, that a sanction (to review an order) given under section 15 (1) (a), Punjab Land Revenue Act, is not an "order" which is appealable under the Act.

Appeal from the order of H. J. Maynard, Esquire, Commissioner, Rawalpindi Division, dated the 5th September 1911.

The order of the learned Financial Commissioner was as follows :—

FENTON, F. C.—I concur in the substantial justice of the 27th March 1912. Commissioner's order and for the reasons and on the grounds which are mentioned below, I propose to give effect to it; but there has been a technical irregularity in the procedure which it is necessary to notice. I think that a sanction to review given under section 15 (1) (a), Land Revenue Act, is not an "order" and is therefore not appealable. There is an appeal from a review, *i.e.*, from an order passed in review, provided that it is not an order confirming on review a previous order, *vide* section 15 (3), Land Revenue Act. It would be anomalous to treat as subject to appeal the mere granting of permission to undertake the review procedure when, as sometimes happens, the order resulting from such procedure may be one which under section 15 (3) is not appealable. An order is in section 2 (14) of the Civil Procedure Code defined as "the formal expression of any decision of a Civil Court which is not a decree." It does not appear to me having regard to this definition that the sanction given by a controlling to a subordinate Revenue Officer to review an order is in itself an order. If this view be correct it

follows that the action of the Commissioner was premature and that no appeal lay to his Court so long as the sanction given by the Collector had not been acted upon. He could, of course, have taken up the case on the revision side.

The case having now come before me I find it to be one in which an applicant for partition desires to withdraw his application. Under section 118 (3), Land Revenue Act, it is within the discretion of the Revenue Officer to allow withdrawal. In the circumstances of the present case it is right and proper to allow the application of the first party (Ahmad, son of Manga), more especially as numerous irregularities have occurred in the conduct of the case, and also because the original second party, Tahir, has alienated his share to the persons who now represent the second party. No action is necessary under section 118 (4), Land Revenue Act, because there is no other "applicant" than the first party. My order, therefore, is that the proceedings be consigned to the Record Room. The second party can, at any time, file a fresh application for partition when proceedings would commence *de novo*.

Appeal rejected.

No. 4.

Before Hon. Mr. M. W. Fenton, C.S.I., Financial Commissioner.

JANGI AND OTHERS—(DEFENDANTS)—PETITIONERS
Versus

DALIPA AND OTHERS—(PLAINTIFFS)—RESPONDENTS.

Revenue Revision No. 78 of 1911-12.

Custom—alluvion and diluvion—submerged occupancy holding—who entitled, on its recovery—agreement in Wajib-ul-arz, whether binding—Regulation XI of 1825—general rule.

Held, that an entry in a *Wajib-ul-arz*, which lays down that occupancy tenants lose the portion of their tenancy, which is submerged by a river and that it goes to the owners on recovery, who will reduce the rent *pro rata*, is not enforceable (1) as being without consideration and (2) as being opposed to the provisions of Regulation XI of 1825.

Held also, following 8 P. R. (Rev.) 1901 (*Roshan v. Pohlo*) (1) that, in the absence of proof of a custom to the contrary, the general rule in the Punjab must prevail—viz., that an occupancy tenant does not lose his right by reason of the land of his holding being submerged.

Held further, that strict proof should be required of any alleged custom contravening this general rule.

15 P. R. 1872 (*Rama v. Sher Singh*) (2), referred to.

(1) 8 P. R. (Rev.) 1901.

(2) 15 P. R. 1872.

Petition for revision of the order of P. J. Fagan, Esquire, Commissioner, Jullundur Division, dated the 11th November 1911.

Both parties represented by their counsel.

The order of the learned Financial Commissioner was as follows :—

FENTON, F. C.—The facts of this case are given in the following extract from the judgment of the Collector who reversed, on appeal, the decree of the first Court :— 1st April 1912.

“ Briefly, the suit is for the possession of land amounting to 28 *kanals* 12 *marlas* on the ground that by reason of its having been encroached upon by the bed of a torrent the defendants who are now in possession have no longer rights of occupancy as they originally had, and as they have again recently taken possession they are now liable to ejectment. The lower Court has found that the defendants took possession again as soon as they could and that the custom recorded in the *Wajib-ul-arz* is inoperative. Against this order the defendants*

**Sic.* The Collector should have said plaintiffs. “ appeal. On examining the record I “ find it alleged in the plaint that the

“ land in question has been subject to “ the action of the *khad* or torrent and not to that of the Sohan “ stream. There are separate alluvion-diluvion rules as to these “ streams. The *Wajib-ul-arz* lays down as follows :—

“ On behalf of tenants it is written :—

‘ When the land of any occupancy tenant is engulfed he will bear the loss if it is less than 5 per cent. *ghumaos* of the tenancy. When more than 5 per cent. *ghumaos* of the tenancy is engulfed, the tenant will receive compensation (or reduction of rent-*mujrai*) from the owner. We will have no further right to the land if recovered. And in the event of our not receiving any compensation (or reduction of rent) by reason of the slight nature of the damage we will maintain our (tenancy) rights in the land if recovered.’ * * *

“ There seems no reason for not applying the terms of the *Wajib-ul-arz* to the present case. It is a formal agreement signed by both parties at the time of the settlement.”

The Collector, accordingly, held that the defendants were liable to ejectment and this finding was upheld by the Commissioner on appeal. The present application for revision has been made to this Court by the defendants. The Collector’s decision practically amounts to a finding that the defendants are bound by the agreement to which their predecessors in the occupancy tenancy were parties in 1869, when the *Wajib-ul-arz* containing

the entry cited by the Collector was drawn up. Now there are two reasons for holding that the defendants are not bound by this agreement. The first is that the agreement was without consideration. Under it the tenants consented to abandon a valuable right—the right to resume possession of their occupancy lands when restored by alluvion. This right has been established by a series of rulings of the Chief Court and in Sir L. Tupper's ruling, published as No. 8 P. R. (Rev.) 1901 (*Roshan v. Pohlo*) (1), it is declared to be the general rule of the Punjab. It may be argued that the remission by the landlord of the rent payable in respect of the diluviated land was the consideration for the tenants' promise not to claim the land on re-appearance. But under section 14 of the Punjab Tenancy Act, 1868, the tenants had a statutory right to abatement of rent in respect of any areas included in the tenancy that might be diluviated, and therefore a promise to allow the tenants the benefit of a statutory right which they already possessed cannot be regarded as a consideration for the tenants' promise. Under section 25 of the Contract Act an agreement made without consideration is void.

But the main reason for treating the agreement recorded in the *Wajib-ul-arz* of 1869 as inoperative in the present case, is the legal one that questions of alluvion and diluvion are governed by custom or by statute, and parties are not at liberty to enter into agreements binding on future generations by which a different rule of decision shall be made applicable. Under Regulation XI of 1825 the rule of decision in alluvion and diluvion cases is declared to be *firstly*, custom, *secondly*, the provisions of the Regulation where they apply, and *thirdly*, "general principles of equity and justice." In this connection No. 15 P. R. (Civ.) 1872 (*Rama v. Sher Singh*) (2) may be referred to. I know of no provision of law which would empower parties who are subject to customary law in alluvion and diluvion matters to enter into a contract providing that they and their descendants shall not in future be subject to that rule of decision. An Act of Legislature (Descent of Jagirs Act) was necessary to enable a person subject to the ordinary customary law of succession to introduce a rule of primogeniture or descent to a single heir. Similarly statutory provisions have been found necessary in the Colony Bill for the purpose of enabling tenants to dispose of their property otherwise than in accordance with their customary law. A still more relevant illustration of the principle under discussion is available. Legislation—the Punjab Riverain Boundaries Act of 1899 was necessary to over-

(1) 8 P. R. (Rev.) 1901.

(2) 15 P. R. 1872.

rule the provisions of the Regulation of 1825 in so far as it made custom and usage the rule of decision in cases affecting the boundaries of estates. Accordingly, I must hold that the rule of decision in the present case is custom, and that the agreement recorded in the *Wajib-ul-arz* of 1869 cannot prevail if it be looked upon merely as an agreement. But, it may be argued, the entry in the *Wajib-ul-arz*, besides being an agreement, is evidence of custom. In form the entry does not purport to be a statement as to custom. There is no assertion that the forfeiture of rights by the occupancy tenants is an incident of existing tenure. It is the future tense that is used. Nothing in the language of the agreement justifies our regarding it as a statement of current custom. At the previous settlement of 1851 a *Wajib-ul-arz* was also prepared, but it contains no entry corresponding to that now under consideration. There is no evidence that prior to 1869 the practice was in accordance with the unusual conditions inserted in the *Wajib-ul-arz* of that year.

The question of *onus* of proof as to custom arises here. In the ruling of 1901, already referred to, Sir L. Tupper says, "I hold that the general rule in the Punjab is that an occupancy tenant does not lose his right by reason of the land of his holding being submerged. A custom to the contrary may be proved, but such a custom is plainly inequitable and very strict proof of it should be required before it is acted upon." It is impossible for reasons explained above to hold that an agreement looking to the future amounts to "very strict proof" of a custom which, like all customs, should have some root in past practice. Nor have the plaintiffs otherwise discharged the obligation to furnish "very strict proof" in support of their contention. They have cited one similar case in which in another village the Collector gave a decree in favour of the landlord on a similar cause of action. The Collector was the same officer (Col. Egerton) who dealt with the present case in the first instance, and the view which he took was, as in the present case, based on the sanctity of the *Wajib-ul-arz* agreement. On the other hand, there is a mass of evidence in decided cases to the effect that occupancy tenants are entitled to recover diluviated land. In his judgment, dated 28th August 1900, in a *tahsil* Una case, *Nihal Chand and others v. Jhalla and others*, S. Aziz Din, Extra Assistant Commissioner, remarks that out of 27 plots of land restored by the hill torrent 24 had been recovered by the occupancy tenants notwithstanding an entry in the *Wajib-ul-arz* to the effect that occupancy tenants had no concern with alluviated land. In another case, *Lachman and others of*

mauza Basal, tahsil Una, v. Gulaba and Sundar, in which the *Wajib-ul-arz* contained an entry to the effect that when land under the possession of occupancy tenants is rendered unfit for cultivation by the Cho or Solan stream, the occupancy rights of the tenants therein cease to exist. Mr. Fagan, the Collector, in his judgment, dated 25th July 1901, which was given in favour of the occupancy tenants, noted, that in at least 58 cases in the village occupancy tenants had contrary to the provisions of the *Wajib-ul-arz* recovered possession of land on its re-appearance after having been carried away by the stream. All indications seem to point to the conclusion that the provisions regarding forfeiture of occupancy rights contrary to the general custom of the Punjab, which found a place in the *Wajib-ul-arz* of so many villages of the Una *tahsil* in 1869, were inserted without due care and attention in a routine manner—probably at the instance of interested landowners.

In view of all the foregoing considerations I must hold that the plaintiffs in this case have failed to discharge the *onus* which lay heavily upon them of proving a special custom, contrary to the general custom of the province, entitling them to treat as irrecoverable by their occupancy tenants land carried away by torrent action and subsequently restored. I accordingly under section 84 (5) of the Punjab Tenancy Act direct that the plaintiffs' suit be dismissed, with costs to the defendants against the plaintiffs throughout.

Revision accepted.

No. 5.

Before Hon. Mr. M. W. Fenton, C.S.I., 2nd Financial Commissioner.

GHULAM MUHAMMAD—APPELLANT

Versus

MUSSAMMAT ZEWARO AND OTHERS—RESPONDENTS.

Revision Side No. 209 of 1911-12.

Punjab Land Revenue Act, XVII of 1887, sections 34 (4), 36, (1) and 37 (a)—mutation entries—what enquiry Revenue Officers should make before making such entries.

Held, that a record of rights is a record of titles and not a record of possession. If entries are agreed to by all the parties interested or are supported by a decree binding on those parties, possession may be disregarded. In other cases, i.e., disputed cases, the facts as to possession are, under section 36, Revenue Act, relevant to the decision of the dispute, not for the purpose of making mutation follow possession but for the purpose of ascertaining whether facts "proved or admitted to have occurred" (section 37 (a)) justify a variation of the existing record of rights.

7 P. R. (Rev.) 1895 (*Secretary of State v. Bhagwan Das*) (1), followed.

1 P. R. (Rev.) 1891 (*Mian Khan v. Alam Khan*) (2), dissented from.

Held also, that the enquiry to be made before passing orders in mutation proceedings should be of a summary character only.

1 P. R. (Rev.) 1901 (*Harnand v. Jamna*) (3) and 14 P. R. (Rev.) 1901 (*Momanda v. Farid*) (4), followed.

Held, consequently that as in the present case the transfer had been made by a person of full age and possession had passed to the transferee, mutation should be made in favour of the latter, irrespective of Customary Law consideration as to the validity of the transfer.

The difference in the value of possession as evidence of title in cases of transfer and inheritance, respectively, pointed out.

Case reported by H. J. Maynard, Esquire, Commissioner, Rawalpindi Division, dated the 9th July 1912.

The order of the learned Financial Commissioner was as follows :—

FENTON, F. C.—This is a mutation case. Mussammatt 26th August 1912. Zewaro, an unmarried girl, has sold 20 *kanals* of land to Ghulam Muhammad. Mussammatt Zewaro's reversioners, Gul and Ahmad, object to the mutation on the ground that Mussammatt Zewaro was not empowered to alienate. The Naib-Tahsildar found that possession of the land had been made over to the alienee and sanctioned the mutation. The Collector to whom

(1) 7 P. R. (Rev.) 1895.

(2) 1 P. R. (Rev.) 1891.

(3) 1 P. R. (Rev.) 1901.

(4) 14 P. R. (Rev.) 1901.

the reversioners appealed, set aside the Naib-Tahsildar's order and rejected the mutation. His order is as follows :—

“ Zairo is the daughter of Roda. The latter entered into a mortgage in 1896 which was upset on the suit of the collaterals. There has been much litigation between the parties, sometimes against one another and sometimes in collusion with one another. Zairo is to all appearances about 15 years old and a minor. She has now married after selling all she had immediately before the marriage.

“ Possession as owner has probably passed to the vendees. The whole transaction appears fraudulent, and even for mutation purposes I cannot uphold a sale by a minor unmarried daughter immediately before her marriage. I accept the appeal and refuse mutation. Order will carry costs.”

An application for revision having been made by the vendee to the Commissioner (Mr. Maynard) that officer has under section 16 (3) of the Land Revenue Act reported the case for the orders of the Financial Commissioner, at the same time intimating that the parties do not desire to be heard by this Court. Mr. Maynard's order of reference (dated 9th July 1912) is as follows :—

“ This case raises an important question, on which I should welcome an authoritative pronouncement by the Financial Commissioners. The Collector holding a sale to be *prima facie* void, refuses mutation though possession has actually passed to the vendee. In this he follows Sir Lewis Tupper's judgment in case No. 14 of 1901 : though that case is possibly distinguished by the fact that, in it, the gift was an ‘ attempted ’ one. In using the expression ‘ has attempted to make a gift ’ Sir C. L. Tupper apparently implied that possession had not passed. If, in the precedent case cited, possession had passed, I venture to say that the ruling ought now to be overruled. If, in the precedent case, possession had not passed, the present case should be distinguished from it.

“ The Collector has on his side of the argument the administrative rulings in paragraph 13 of Standing Order No. 23 ; and would naturally argue that if transfers, where possession has actually passed, are nevertheless to be ignored by an attesting officer because they are contrary to the Punjab Alienation of Land Act, other transfers which he considers to be illegal should be similarly treated. I do not think that the parallel between the two sets of cases is complete. Under the Punjab Alienation of Land Act the Collector is, by law, the authority who disposes of the question of the propriety of a transfer. But a valid decision regarding transfers which are not alleged to contravene the Punjab Alienation of Land Act can only be given by the regular Courts.

“ Apart from this distinction, it would be unusual to argue from a mere administrative instruction, which is not a judicial ruling, in order to establish, judicially, a particular interpretation of the law. I think therefore that the instructions in paragraph 13 of Standing Order No. 23 ought not to enter into the present argument at all.

“ The argument in Sir Lewis Tupper's judgment in case No. 14 of 1901 appears to me defective in the following particular. While it correctly

“ states, or implies, that the object of the mutation procedure is to bring the
“ record into accordance with facts, that is to say to make it a true statement
“ of rights, and while it correctly distinguishes between a function belonging
“ to an attesting officer and a function belonging to a regular Court, it ignores
“ the evident intention of the legislature that the officer making the summary
“ enquiry shall be guided by the state of actual possession, if actual possession is ascertainable, and shall only extend his summary enquiry to the
“ ascertainment of right if he has been unable to ascertain possession. The
“ decision based upon possession will not be final : for it is open to the
“ reversioner or other person aggrieved to take his claim to a regular Court.
“ But it is the person who denies that possession represents right who should
“ be required to seek a Civil remedy. Sir Lewis Tupper was, I venture to say,
“ in error in holding that ‘ in altering the record by the mutation procedure
“ we are bound, with due regard to the conditions of a summary enquiry, to
“ satisfy ourselves that the altered record will be at least most probably true.’
“ Or, perhaps, I should rather say that the word ‘ true ’ is here ambiguous.
“ If it means ‘ a true statement of the facts of possession, where possession
“ is ascertainable, and a true statement of rights, where possession is not
“ ascertainable ’ the sentence is correct. But if it means merely ‘ a true
“ statement of rights,’ I venture to think that the true function of an attesting
“ officer, as distinguished from that of a regular Court, has been misstated.
“ Of course, the law itself is not very distinct in its use of the word ‘ true ’ :
“ and I do not know, with any certainty, whether the presumption established
“ by section 44 in favour of the record, is a presumption that it is a true
“ statement of the facts of possession, or a true statement of rights. However,
“ that is by the way.

“ In the present case, the facts ‘ proved or admitted to have occurred,’
“ are that vendor and vendee went through a form of sale which they at all
“ events intended to be valid, and that possession passed in accordance with
“ it. I think it is for the objector to establish by regular suit the invalidity
“ of the sale, and for the revenue authorities to give effect to it on the basis
“ of possession.

“ In judgment No. 1 of 1891 Sir Denzil Ibbetson took a very strong view
“ of the importance of the facts of possession for the purposes of the mutation
“ procedure. And section 36 of the Land Revenue Act appears to me to
“ leave no room for doubt on the subject. The precedent which will be
“ established by the decision on this case will be important, because the two
“ practices (1) of ignoring the actual state of possession in the mutation
“ procedure and (2) of arrogating judicial or *quasi-judicial* functions to
“ attesting officers so as to decide disputed questions of right : have become
“ very common and are plausibly justified even by officers of considerable
“ revenue experience.

“ I have heard the parties and now I send the case for the orders of the
“ Financial Commissioner on the revision side. The parties have been
“ informed that they are not obliged to attend before the Financial Commissioner, and they say, they do not desire to do so.”

I agree with the Commissioner as to the importance of the questions raised by a case like the present. I have for long been greatly impressed by the fact that not only the practice of different revenue officers in mutation cases, but also their views as to the theory or principle by which orders in such cases

should be governed, have been fundamentally divergent. There is undoubtedly need for some examination of the rulings which have since the passing of the Land Revenue Act of 1887 been published under the authority of successive Financial Commissioners. While for reasons, which will be explained below, I propose to pass an order of revision as recommended by the Commissioner in this particular case. I am quite unable to subscribe to some of the general propositions set forth in Mr. Maynard's order of reference. But I agree with him as to the need for a clear understanding in regard to the general principles which should govern mutation procedure in a case like the present.

In enunciating any general principles or rules for the guidance of mutation officers it is very necessary to keep in view the distinction between law and policy, between that which the Revenue Officer is in pursuance of statutory provisions legally *bound* to do and that which he *ought* to do in the wise exercise of the discretionary authority vested in him. Most revenue officers are familiar with the "*Title v. Possession*" controversy. In the opinion of some there is a legal obligation to make mutations follow possession, while others consider that it rests entirely within the discretion of the mutation officer whether the rule of decision shall be possession or title.

In so far as the notion prevails that mutation, in virtue of the provisions of the Land Revenue Act, must, as a matter of legal necessity, be in accordance with possession, it is traceable to the pronouncement contained in the ruling of Mr. (late Sir Denzil) Ibbetson published as No. 1 *P. R. (Rev.)* of 1891 (*Mian Khan v. Alam Khan*) (1). In that judgment it is declared that "*in all disputed cases mutation is to follow possession.*" Now I venture to dissent from this doctrine, and I do so with the more assurance because such authorities as Sir M. Young, Mr. Thorburn, Sir James Wilson and Sir James Douie have placed on record opinions which point to the conclusion that mutations should be based primarily on title.

In the case referred to, Mr. Ibbetson did not consider the history of the mutation sections of the present Land Revenue Act. Had he done so it is probable that he would have reached a different conclusion. An account of the genesis of these sections is contained in Sir Mackworth Young's judgment No. 7 *P. R. (Rev.)* of 1895 (*Secretary of State v. Bhagwan Das*) (2). For facility of reference I reproduce here an extract from that ruling :—

(1) 1 *P. R. (Rev.)* 1891.

(2) 7 *P. R. (Rev.)* 1895.

" Fortunately I am able to test this view by referring to the opinions on the Bill before it became law. Section 36 originally ran as follows :—

" All entries in the record shall be founded on the basis of actual possession, and all disputes regarding such entries taken up by the officer making the settlement, either of his own motion or on the complaint of any party concerned, shall be investigated and determined by him on that basis," &c. . . . " All persons who are not in possession, but claim to be entitled to possession, shall be referred by him to the proper Court."

This was altered to the present form in consequence of several opinions, the most important of which, that of Colonel Wace, the framer of the Bill, was to the following effect : " I would ask for a very careful consideration of the principle of this section, which is that all disputes as to the entries to be made in a Settlement Record shall be decided on the basis of actual possession, because this appears to me to be only an incomplete statement of the existing law, and to alter it and limit it in an undesirable way.

" There are two operations to be considered—1st the making of a record of rights where no such record before exists ; secondly, the revision of an existing record.

" In respect of the revision of an existing record, I solicit attention to the operation of section 79, which is a repetition of section 19 of the existing Act. Under that section a revising officer cannot decide a question of disputed possession, so as to alter the record, except so far as may be necessitated by facts which have occurred since the previous record was made. This limitation on a Settlement Officer's power should be maintained, and I therefore suggest that this section 70 be qualified by stating at its commencement the following words : ' Except as otherwise provided by section 79.'

" The history of the Punjab Tenancy Act affords the strongest reasons against allowing a Revenue Officer to alter the record of his predecessor on the basis of possession, except in cases in which possession has changed since the record was made. There remains the part of the subject that relates to disputes advanced when a record is being made for the first time, and also to disputes advanced at the revision of record in respect of facts which have occurred since the record was made. Is a direction for the decision of these disputes, '*on the basis of actual possession*,' either just or sufficient? According to my experience, and that of all Settlement Officers with whom I am acquainted, it is not. Actual possession is the best general guide, but it is not one that can be followed without qualification. I give the following cases in explanation :—

*	*	*	*	*	*	*
*	*	*	*	*	*	*
*	*	*	*	*	*	*

" The cases I allege are not arguments against the value of possession as a general guide to the framing of the record. All I wish to show is that the rule is not sufficient as an absolute and exclusive guide. It should be remembered that we have to frame, not a record of possession, but a record of rights, and that we require the Courts to presume that the rights are as stated in the record ; and a careful consideration of the subject will, I think, show that the difficulty would only partially be got rid of by chang-

“ing the name of the record to a ‘*record of possession*.’ I submit that the framing of the record of rights is a *quasi-judicial* operation, and however strongly possession may be insisted on as the main guide, the Revenue Officers who frame it ought to be allowed a certain discretion to be exercised in cases such as I have instanced, and that we ought not by a too rigid framing of the law to compel the entry of rights as belonging to persons to whom it is notorious they do not belong, nor to compel our officers to substantially support possession which is wrongful, thereby referring innocent persons unnecessarily to costly civil litigation.”

No one reading this explanation of the changes made in the Land Revenue Bill during its passage through Council, at the instance of the member who was in charge of the measure during its final stages, can entertain any doubt as to what was the *intention* of the legislature. The record of rights, as its name implied, was to be a record of titles not a record of mere possession. In so far as this involved a departure from any pre-existing theory as to the nature of the entries in the village records the change was justifiable by the circumstance that the Act of 1887, for the first time, attached a presumption of truth to entries in the annual record.

But it is a maxim of interpretation in construing statutes that no matter what the intention of the Legislature may have been the Courts are bound to follow the wording of the enactment and to disregard evidence as to intention, when inconsistent with the language actually used in the Act as passed, if the latter is clear and unambiguous. It is necessary therefore to examine from this point of view the grounds on which the pronouncement contained in the ruling No. 1 P. R. (Rev.) of 1891 (*Mian Khan v. Alam Khan*) (1) is based. The process of reasoning by which Mr. Ibbetson reached his conclusion is set forth in the following passage in that judgment :—

“Section 36 prescribes the procedure in cases of dispute. The wording is not as clear on the point as it might be ; but clause (2) practically amounts to a direction to the Revenue Officer to ascertain possession ; and if he cannot ascertain it, to make it, by putting the person, who is apparently entitled, into possession. In this latter case the entry is to follow possession ; and I think it must be held that it will do so in the former case also, *otherwise there is no object in ascertaining possession*. Thus in all disputed cases mutation is to follow possession.” Now the words in the above passage to which I think exception can be taken are those which I have italicized. The inference that the mutation must follow possession is based on the premise that that there can be no other object in ascertaining possession. If the validity

(1) 1 P. R. (Rev.) 1891.

of this premise can be successfully assailed the conclusion derived from it must be abandoned. Now it seems to me that there is another very distinct and definite object to be attained by ascertaining possession. The most important issue which presents itself to the mutation officer in disputed cases is whether he is at liberty to vary the previous entry in the record of rights. By section 37 (a) of the Act he is debarred from doing so otherwise than in accordance with "facts proved or admitted to have occurred". For the purpose of determining whether an alleged alienation, for instance is "a fact proved to have occurred" the most obviously essential step in the inquiry, which under section 34 (4) and section 36 (1) the mutation officer is bound to hold, is the ascertainment of the facts as to possession. An alleged gift, sale or mortgage, if disputed, will generally be regarded by the mutation officer, and reasonably be regarded, as a fact *not* "proved to have occurred" if the donee, vendee or mortgagee has failed to obtain possession. Possession being proverbially nine points of the law the mutation officer is very rightly required to ascertain it, as being one of the most important incidents to be considered in determining whether an alleged transfer is a "fact proved to have occurred." In view of the importance of possession in this connection, and not because it is the sole determining factor, the mutation officer is, in disputed cases, required to ascertain possession. For there may be in every case a tenth point of the law. There are cases in which title does not, and ought not, to follow possession. It cannot, for instance be seriously contended that either in pursuance of the law or of any considerations of policy or expediency, the mutation officer is bound to recognise the possession of the mere trespasser, of the party who by fraud, stealth or violence gains possession of that which is the undoubted property of another and holds it without any colourable title whatsoever other than 'might is right.' To extend recognition to such a tenure would be tantamount to acknowledging the title of a burglar to the proceeds of his burglary.

It has then been shown that the history of the legislation of 1887 negatives the conclusion that it was intended by those responsible for the mutation sections of the Land Revenue Act to require mutation invariably to follow possession. It has been shown that the actual language of section 36 does not, as Mr. Ibbetson supposed, impose upon the Revenue Officer any obligation of the kind. Even when resort is had to the exceptional procedure of putting one of the disputant parties in possession of the property, it is not because he has been

put in possession, but because his being put in possession is the consequence of his being "best entitled", that mutation is effected in the name of such party. But there is still another line of argument which can be brought forward against the champions of the "possession" theory. That theory rests on the general position that the record of rights is or should be what is described as a record of actual facts, a photograph, so to speak, of the actual situation on the spot. But it is clear that it is not and cannot be this. Section 37 authorises entries to be made in accordance with what is agreed to by the parties concerned. In such cases possession may be disregarded entirely. It is true that a rule under the Land Revenue Act at one time required mutation officers to postpone mutation in such cases if possession had not been given.* But, as pointed out by Mr. Ibbetson in his judgment of 1891, this rule was *ultra vires*. It has since been repealed, and is now no longer in force. Accordingly to the extent that persons not in possession can by agreement have mutations sanctioned in their favour, the record of rights ceases to be a record of actual possession. It also fails to be a record of actual possession in another class of cases for which section 37 of the Land Revenue Act makes provision, cases in which entries are made in pursuance of a decree or order binding on the parties interested. There is not in the Land Revenue Act any warrant for the view, sometimes entertained and acted upon by Revenue Officers, that mutation cannot in such cases be sanctioned until the decree or order has been executed. Of course a decree or order cannot in mutation proceedings based on clause (b), and not on clause (a), of section 37, prejudicially affect a person upon whom it is not binding.

The conclusion of the foregoing arguments is that the record of rights is a record of titles and not a record of possession. The procedure of the Revenue Officer in dealing with mutations is determined by the nature of the mutation. If the case is one in which the proposed entries "are agreed to by all the parties interested therein or are supported by a decree or order binding on those parties" possession may be disregarded. In other cases, that is to say, in disputed cases, section 36 makes it clear that the facts as to possession are relevant to the decision of the dispute, but they are relevant not for the purpose of making mutation follow possession, but for the purpose of ascertaining whether facts are "proved or admitted

to have occurred," which would justify a variation in the existing record of rights. Clause (4) of section 34 authorises the Revenue Officer to make "such order as he thinks fit". His discretion is of course governed by section 37, as above explained, and before passing orders an inquiry is necessary. But subject to these limitations the mutation officer has under the Act a very wide discretion to pass "such order as he thinks fit".

The mutation officer is, however, apart from such statutory limitations, bound by the various rulings of Financial Commissioners which are still in force, and by the rules, circulars and instructions from time to time issued by competent authority to guide his discretion. Such rulings, rules, circulars and instructions have generally been concerned with two main questions, *viz.* (1) the foregoing question of "title *versus* possession", which, however, is transferred to a lower plane of controversy, and ought rather to be described as the question of how far possession is to be treated as evidence or proof of title; (2) the extent, nature and scope of the inquiry into title which the mutation officer should make before passing orders.

The extent to which possession or the absence of possession should be regarded as proof, for mutation purposes, that a fact has or has not occurred depends mainly on whether the case is one of transfer or of inheritance. There are certain fundamental differences between the two classes of cases. In succession cases a mutation of some sort must be effected. There is in these cases no such thing as a rejected mutation. A right-holder has died, and the old entry must be varied by the omission of the name of the deceased. The right, in devolution, must be recorded as belonging to somebody else. A particular claim may be rejected but mutation must be sanctioned in favour of some heir or heirs. In transfer cases, on the other hand, and especially in disputed cases which constitute the test of the whole system, the issue is not only what the new entry shall be, but whether a new entry shall be made at all or not. In succession cases there is seldom any dispute as to what property shall be mutated. It is the totality of the rights of the deceased right-holder. In transfer cases not only may there be a dispute as to the area or extent of the right transferred, but also as to the nature of the interest alienated. Such questions arise as to whether the transfer is of a share or of specific fields; whether *shamilat* rights are or are not also conveyed; whether a mortgage is with or without possession,

whether redemption money has or has not been paid. In succession cases the dispute is between rival heirs. In transfer cases it is generally between the transferor and transferee. Possession as evidence of title has a different value in the two classes of cases. The possession* of the active and alert heir who is on the spot and makes the most of his opportunities to circumvent the claims of his rivals by seizing the property of the deceased right-holder as soon as the breath leaves his body, does not count for very much as evidence of title. On the other hand, the possession of the right-holder who all along has been in possession and whose title is impugned by a transferee under an alleged contract counts for a very great deal. Mutation officers are very chary of deciding against possession in the latter class of cases, and rightly so. They decide in favour of possession† because an alleged contract of sale, mortgage, exchange, gift or the like, not followed by possession, when disputed by the alienor who remains in possession, is not regarded as a “fact proved to have occurred” within the meaning of section 37 (a) of the Land Revenue Act, or, to adopt the language of Barkley’s Directions, “*the truth of the transfer*” has not been proved.”

In some cases and especially in inheritance cases, as above explained, it is often not feasible or not equitable to decide on the basis of possession without some inquiry into title. As to what the general rule should be in disputed inheritance cases I cannot do better than quote from the recorded opinions of two distinguished revenue officers. Sir James Wilson says :—

“ In disputed cases of inheritance comparatively little stress should be placed upon possession, as it often is not true evidence of right. The relatives living with the deceased naturally take possession on his death, and there may be others who have obviously an equal or superior right ; for instance, when one of the sons is absent on service, or when the deceased has a resident son-in-law, who cannot by custom exclude the collaterals, I would not require the Assistant Collector to alter the record merely in accordance with the facts of possession (often difficult to ascertain) when they are

* Under sections 88, 90 and 94 of Act II of 1882 such possession may often be legitimately treated as possession on behalf of all the heirs. (M. W. F.).

† Possession, of course, does not always mean physical possession. Often the mutation officer has to decide against physical possession because it is not the particular kind of possession that affects the question in issue. Thus when a mortgagor who holds as tenant under his mortgagee asserts that he has redeemed and the mortgagee denies it the mutation officer would be in error if he treated the mortgagor’s possession alone as proving that redemption had occurred. (M. W. F.).

“ obviously contrary to right. I would here also give him some discretion, and would instruct him to record the facts of possession so far as he can ascertain them by summary enquiry, but to make the new entry in accordance with what he finds to be the rights of the claimants, if they seem free from reasonable doubt.”

Sir James Douie expresses his views as follows :—“ In disputed cases of inheritance apparent right should be the rule of decision. A strict application of the possession rule would in some cases land us in manifest injustice.”

In the foregoing opinions I concur. But the obligation to investigate in mutation proceedings disputed questions of title will not commend itself to some officers. Such officers should however note that there is ample authority for the view that investigations of the kind should be of a very summary character. In this connection the *dicta* of Sir Lewis Tupper in Revenue judgments Nos. 1 *P. R. (Rev.)* 1901 (*Harnand v. Jamna*) (1) and 14 *P. R. (Rev.)* 1901 (*Momanda v. Farid*) (2) may be referred to. In transfer cases where anything more elaborate than a summary inquiry is necessary to decide whether a fact is “ proved to have occurred ” it will be best to refuse mutation and refer the parties to the Courts. But as above explained in inheritance cases a new entry must be made. The scope of the inquiry must be left to the discretion of the mutation officer, but it must necessarily be summary. It will generally be preferable in doubtful cases to follow the rule of possession rather than embark upon an elaborate inquiry into titles, especially when the issues are those which depend upon the application and interpretation of controversial points of customary law. But for reasons above explained care should be taken to recognise fiduciary, constructive and vicarious possession as well as physical possession when the situation justifies such recognition.

Such being the general considerations by which in my opinion mutation officers should be guided, I now proceed to deal with the particular case with which the present revision reference is concerned. The Collector has rejected the mutation because he holds that the vendor, Mussammatt Zewaro is a minor. The Commissioner does not traverse this finding but apparently takes the view that the question of the invalidity of the sale-contract in consequence of the minority of the vendor is not a question with which the mutation officer is concerned, in view of the fact that possession in pursuance of the sale contract has passed to the vendee. In this, I do not agree.

A minor is incompetent to enter into a contract (section 11 Act IX of 1872) and a contract, one of the parties to which is a minor is not merely voidable but is void. It is not validated by the transfer of possession. Accordingly, if the minority of Mussammat Zewaro in the present case be established, the sale which she effected must be treated as void and may not be followed by mutation. But Mussammat Zewaro's minority has not been established. On the contrary, it has been ascertained by an inquiry which I caused to be made that Mussammat Zewaro was born on 3rd August 1892. The sale-deed in the present case is dated 8th September 1911. Accordingly, the age of majority being 18 years (Act IX of 1875), Mussammat Zewaro was not a minor when she sold her land to Ghulam Muhammad, and the ground on which the Collector has rejected the mutation thus disappears. There remains the question whether a mutation of sale should be rejected, if or because the mutation officer considers that the vendor has exercised a power of alienation opposed to the customary law of the alienor. For three reasons, one of convenience, one of law and one of policy, I consider that in such cases when possession has taken place in pursuance of the contract the mutation officer should sanction mutation irrespective of customary law considerations. *Firstly*, the ascertainment of the customary law entails an inquiry exceeding in its scope the limits of the summary inquiry which alone is appropriate in mutation cases. *Secondly*, the transfer though it may be a contract *voidable* at the instance of a reversioner, is not, as between the contracting parties, in itself void. *Thirdly*, as a matter of policy, it is not desirable that executive officers should by action in mutation cases interpose obstacles to the development of custom. The tendency of such development is towards the enlargement of the powers of the individual to dispose of his property and the restriction of the veto of the tribe, the clan, and the agnatic group. It is a recognised principle that by a multiplicity of precedents and instances departing from an ancient custom, a new custom opposed to that previously prevailing may be established. Such instances of innovation if unchallenged will in time become so numerous as to justify recognition by the civil Courts. But the challenge should be before tribunals competent to decide the issues involved. Mutation officers are not competent to decide these issues and they should not take any action prejudicing their decision. A refusal to sanction a transfer-mutation based on possession would operate prejudicially while on the other hand sanction to the mutation would in no way be binding on a person who was not a party

to the transfer and would not prejudice the issues of customary law. For the foregoing reasons I see no sufficient ground for rejecting the transfer in the present case. Accordingly under Section 16 (4) of Land Revenue Act, I set aside the order of the Collector and restore the order of the Naib-Tahsildar, dated 21st January 1912.

Revision accepted.

No. 6.

Before Hon. Mr. M. W. Fenton, C.S.I., Financial Commissioner.

AZIZ-UD-DIN AND OTHERS—(DEFENDANTS)—APPLICANTS

Versus

GURU BHAGWAN DAS AND ANOTHER—(PLAINTIFFS)—RESPONDENTS.

Revenue Revision No. 162 of 1911-12.

Punjab Tenancy Act, 1887, section 48—power of Revenue Courts to grant relief against forfeiture for non-payment of rent to tenants under contract—Transfer of Property Act, 1882, section 114—Revision.

Held, that section 48 of the Tenancy Act does not debar Revenue Courts from granting relief against forfeiture for non-payment of rent, if under the general law governing lease contracts such relief is claimable by the lessee.

Held consequently, that the relief allowable under section 114 of the Transfer of Property Act may be granted to a lessee, whose lease has determined by forfeiture for non-payment of rent, the provisions of the section being in consonance with the principles of equity, good conscience and justice.

85 P. R. 1902 (*Mussammat Bhagwan Devi v. Mussammat Bunyedi Khanum*) (1), referred to.

Held also, that the order of a Collector, who fails to consider this point, is open to revision, inasmuch as he has failed to exercise a jurisdiction vested in him by law.

Case reported by H. A. Casson, Esquire, Commissioner, Lahore Division, dated the 21st June 1912.

Muhammad Umar and Miraj Din, for applicants.

Jai Lal, for respondents.

The order of the learned Financial Commissioner was as follows :—

FENTON, F. C.—The plaint alleged that the defendants 30th August 1912. took from plaintiffs the land in dispute on a 20-year lease from 1905 at a rent of Rs. 400 payable in half-yearly instalments. The lease contained a condition providing that the

lessees would be liable to ejectment, should at any time the rent for one year be in arrears. The plaintiffs claimed that the defendants, having fallen into arrears in respect of two half yearly instalments, had incurred liability in accordance with this provision and asked for a decree accordingly. The first Court held that there was evidence that the rent had been tendered to the plaintiffs, and in view of this and of the circumstances that the defendants had paid into Court the rent then due, declined to grant a decree for ejectment but gave a decree for Rs. 400 being the amount of rent paid into Court by the defendants.

On appeal by the plaintiffs the Collector, (Mr. Lumsden) found that the tender of the rent by the defendants to the plaintiffs, was made after the last day on which it fell due. He therefore considered that notwithstanding the payment of the rent into Court he was bound to enforce the forfeiture-condition of the lease, and, accepting the appeal he held that the defendants should, subject to further consideration of the question of payment of compensation for improvements, be ejected from the leasehold.

Further proceedings then ensued with reference to the question of compensation and it is in connection with this question that the Commissioner has referred the case to this court on the revision side.

I do not consider it necessary to deal with the question of compensation because I must hold that the Collector's order decreeing the ejectment of the defendants, was wrong, and that it is liable to revision, inasmuch as the Collector failed to exercise a jurisdiction vested in him by law, *viz.*, the jurisdiction to grant relief against forfeiture for non-payment of rent. It is true that the relief against the forfeiture-section (section 48) of the Punjab Tenancy Act does not specifically provide for relief against forfeiture for non-payment of rent. In the case of an occupancy tenant mere non-payment of rent is not a ground for ejectment. There must be a decree for arrears of rent which remains unsatisfied. As regards tenants holding under contract section 48 of the Tenancy Act gives relief against forfeiture for certain defaults, not including default in payment of rent, but it does not bar or exclude relief against forfeiture for non-payment of rent if under the general law governing lease contracts such relief is claimable by lessees. The law of contract governing contracts of lease is contained in the Transfer of Property Act, 1882, section 114 of which runs as follows :—

“ Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if, at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment within 15 days, the Court may in lieu of making a decree for ejectment, pass an order relieving the lessee against forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred.”

Now the case under consideration was one in which the Court should have exercised the discretion so conferred to give relief against forfeiture under the condition of the lease which is rightly described by the first Court as objectionable and unconscionable. The area leased was planted up as a garden and contained many fruit trees which were about to reach their prime, and ejectment under such circumstances was a very harsh proceeding. It is true that the Transfer of Property Act has no statutory operation in the Punjab (outside cantonments), but as laid down by the Chief Court in its ruling No. 85 P. R. (Civ.) 1902 (*Mussammât Bhagwan Devi v. Mussammât Bunyadi Khanum*) (1) such of sections as laid down principles of law which are in consonance with the principles of equity, good conscience and justice should be followed by the Courts. For foregoing reasons I now direct under section 84 (5) of the Tenancy Act that the defendants, who have been ejected from their leasehold, in pursuance of Mr. Lumsden's order, be restored thereto. It is not necessary to pass any decree for rent in favour of plaintiffs, who have taken delivery of the sum paid into Court by the defendants. Any claim for rent for any period subsequent to that covered by the Rs. 400 paid into Court can be made the subject of a claim hereafter if necessary. In any such adjustment of accounts I may note that the plaintiffs should in accordance with section 114 of the Transfer of Property Act receive interest which may be put at 6 per cent. per annum, on the sum of Rs. 400 from the date on which it fell due as rent until the date on which it was paid into Court. I do not interfere with any orders already passed as to costs. In this Court each party will pay his own costs.

Revision accepted.

No. 7.

Before Hon. Mr. M. W. Fenton, C.S.I., Financial Commissioner.

SHIV DYAL AND OTHERS—(DEFENDANTS)—
APPLICANTS

Versus

PARITAM SINGH AND OTHERS—(PLAINTIFFS)—
RESPONDENTS.

Revenue Revision No. 121 of 1911-12.

Punjab Tenancy Act, XVI of 1887, section 5 (1) (d)—“jagirdar” includes his successor in interest.

Held, that having regard to the definition of “tenant” given in section 4 (7) of the Tenancy Act of 1887, occupancy rights under section 5 (1) (d) are claimable not only by the *jagirdar* himself but also by his successors in interest.

2 P. R. (Rev.) 1897 (*Gandu v. Ganpat Rai*) (1), followed.

6 P. R. (Rev.) 1895 (*Ram Chand v. Umrao Singh*) (2), referred to.

83 P. R. 1882 (*Bhola Singh v. Gopal*) (3), 67 P. R. 1885 (*Habib Bakhsh v. Gulab*) (4), and 148 P. R. 1888 (*Nand Ram v. Ahmad Shafi*) (5), distinguished.

Petition for revision of the order of P. J. Fagan, Esquire, Commissioner, Jullundur Division, dated 27th March 1912.

Jai Lal, for applicants.

Nemo, for respondents.

The order of the learned Financial Commissioner was as follows :—

3rd Sept. 1912.

FENTON, F. C.—The order of the Commissioner in appeal, for the revision of which the present application is made, decrees the ejection of the defendants, their claim to occupancy rights being rejected. I am of opinion that the case is one for the exercise of revisional powers under section 84 of the Tenancy Act on the ground that the facts on record warrant a finding that the defendants are entitled to occupancy rights and that in declining to give a declaration accordingly there has been a failure to exercise jurisdiction sufficient to justify an order of revision.

The clause of the Tenancy Act under which the defendants' claim to occupancy rights has been pressed is 5 (1) (d). “Who, being *jagirdar* of the estate or any part of the estate in

(1) 2 P. R. (Rev.) 1897.

(2) 6 P. R. (Rev.) 1895.

(3) 83 P. R. 1832.

(4) 67 P. R. 1885.

(5) 148 P. R. 1833.

“ which the land occupied by him is situate, has continuously occupied the land for not less than twenty years or, having been such *jagirdar*, occupied the land while he was *jagirdar* and has continuously occupied it for not less than twenty years.”

Now an initial difficulty in connection with a claim under this clause arises from the circumstance that none of the defendants are, or have themselves been, *jagirdars*. They can only claim

*No. 83 P. R. 1882 (*Bhola Singh v. Gopal*) (1), 67 P. R. 1885 (*Habib Baksh v. Gulab*) (2), 148 P. R. 1888 (*Nand Ram v. Ahmad Shafi*) (3). to be descended from *jagirdars*. In no less than three* cases the Chief Court has held that the clauses of the Tenancy Act of 1868 which correspond to clauses

(b) and (d) of section 5 (1) of the Act of 1887 do not recognise the existence of any right upon the part of a representative to revive a claim which the original owner under clause (b) or *jagirdar* or *ex-jagirdar* under clause (d) had failed to assert. It is true that in a case decided in 1897 Punjab Record Revenue No. 2 of 1897 (*Gandu v. Ganpat Rai*) (4), Sir Lewis Tupper upheld the claim under clause (d) of a descendant of a *jagirdar*. But that ruling makes no reference to the three above-mentioned adverse rulings of the Chief Court. As the three rulings in question are cited in text-books as still governing the law on this subject it is necessary to make matters clear. A very material change in the law was introduced by Act XVI of 1887, section 4 (7) of which defines a ‘tenant’ as including the predecessors and successors in interest of a tenant. There was no such definition in the Act of 1868. It cannot be doubted that this important extension of the meaning of the term ‘tenant’ has had the effect of rendering no longer applicable the rulings of the Chief Court which limited the acquisition of occupancy rights in a manner which excluded the claims of those who were only descendants and representatives and not the original tenants to whom the qualifying incidents pertained. The change thus effected by the definition clause 4 (7) of Act XVI of 1887 has in the case of occupancy rights under clause (b) been duly recognised and appraised in Sir Charles Rivaz’s ruling No. 6 P. R. (Rev.) 1895 (*Ram Chand v. Umrao Singh*) (5). It is now necessary to declare in a similar way the right of a successor of a *jagirdar* or *ex-jagirdar* to maintain a claim under clause (d) of section 5, if the other conditions of that clause are satisfied.

The next point in the present case is whether as a fact the defendants are successors in interest of a *jagirdar* or *ex-jagirdar*.

(1) 83 P. R. 1882.

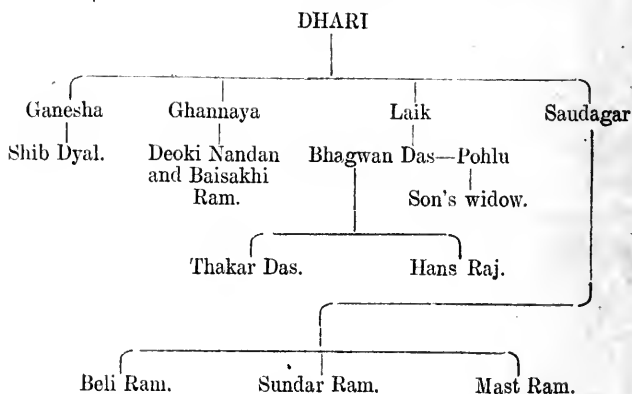
(2) 67 P. R. 1885.

(3) 148 P. R. 1888.

(4) 2 P. R. (Rev.) 1897.

(5) 6 P. R. (Rev.) 1895.

The pedigree-table of the defendants is as follows :—



The Assistant Collector's report of 15th March 1912 shows that originally the *muafi* was granted by Nao Nihal Singh to Dhari, on whose death it was continued to Ganesha by Maharaja Dalip Singh. The *muafi* was confirmed by the British authorities to Ganesha, but the family being a joint one all the brothers shared it. On the death of Ganesha in 1883 the *muafi* was resumed, but the land was settled with Ganesha's brothers and their descendants as well as with Ganesha's son, Shib Dyal. Now such being the facts of the case, the Commissioner, whose reasoning I find a difficulty in following, seems to hold that any claim under clause (d) can be maintainable by Shib Dyal, son of Ganesha, alone among the defendants, because Dhari's *muafi* was continued in the name of Ganesha only. I must dissent from this view. Quite apart from the fact that Ganesha's brothers did actually enjoy the *muafi* conjointly with Ganesha, though it was recorded in the name of the latter alone, it is to be observed that all the defendants are direct successors in interest of Dhari and as such their claims under clause (d) to occupancy rights in the area which they and their predecessors have continuously occupied since Dhari's death are as good as the claims of Shib Dyal which are derived through Ganesha. The facts in this case are indeed in this respect very similar to those with which Sir Lewis Tupper had to deal in Revenue ruling No. 2 P. R. 1897 (*Ganlu v. Ganpat Rai*) (1). But even if as supposed by the Commissioner—Shib Dyal alone were entitled to occupancy rights under clause (d) the Chief Court ruling No. 83 P. R. 1882 (*Bhola Singh v. Gopal*) (2) is authority for the view that in such circumstances occupancy rights over the whole of the joint holding should be granted in the name of the member of the joint family, who is held to be qualified for such rights.

(1) 2 P. R. (Rev.) 1897.

(2) 83 P. R. 1882.

However it is not necessary, for the reasons above explained, to treat Shib Dyal as sole occupancy tenant. All the defendants are equally entitled to the extent of their respective shares, as all satisfy the conditions of section 5 (1) (d) of the Tenancy Act. Accordingly I now direct that the suit of the plaintiffs for the ejectment of the defendants be dismissed with costs throughout and I declare that the defendants are occupancy tenants under section 5 (1) (d) of Act XVI of 1887 of the land to which the present suit relates.

Revision accepted.



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